No. 177

JUN 23 1955

HAROLD B. WILLEY, Cl

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1954

ANN F. AMES, - - - - - - - Petitioner,

versus

THE MENGEL COMPANY, ET AL., - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(AND APPENDIX)

ERNEST WOODWARD,
1805 Ky. Home Life Bldg.,
Louisville, Ky.,
Attorney for Petitioner.

SIDNEY L. GARWIN,
225 Broadway,
New York 7, N. Y.,

L. LYNE SMITH, JR.,
1805 Ky. Home Life Bldg.,
Louisville, Ky.,
Of Counsel.

May, 1955.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term 1954

ANN F. AMES, - - - - - - - *Petitioner,*

v.

THE MENGEL COMPANY, ET AL., - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, Ann F. Ames herein prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered February 7, 1955, affirming the judgment of the United States District Court for the Western District of Kentucky, granting summary judgment for the respondents.

OPINIONS BELOW.

The Opinion of the United States Circuit Court of Appeals for the 6th Circuit is reported in 219 F. 2d 704 and is appended hereto in the Appendix, page 24.

The Findings of Fact and Conclusion of Law and the Revised and Supplemental Findings of Fact and Conclusions of Law of the District Court for the Western District of Kentucky are not officially reported but are included in the Record appended hereto, Appendix, page 57a, 74a.

The Opinion of the United States Circuit Court of Appeals for the 2d Circuit, which involved solely a procedural question in that suit, but involving the same litigants, is reported in 219 F. 2d 704.

JURISDICTION.

1. The judgment of the Circuit Court of Appeals sought to be reviewed was entered February 7, 1955.

2. The Order of the United States Circuit Court of Appeals extending time for petitioners to file their Petition for Rehearing until March 10, 1955 was entered February 25, 1955.

3. The Petition for Rehearing was denied March 25, 1955.

The jurisdiction of this court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED FOR REVIEW.

1. Does Rule 23(b) of the Federal Rules of Procedure require a plaintiff to seek stockholder action prior to instituting a stockholder derivative action when such requirement would be futile because:

(a) The acts complained of constitute a gift of the corporate assets of an officer and director of the corporation and could not be ratified without unanimous consent.

(b) The acts complained of illegally permitted the issuance of stock in exchange for a note upon which there was no personal liability or collateral other than the stock in violation of the New Jersey Revised Statute 14:8-9 and could not be ratified without unanimous consent.

(c) The stockholders could not alter or amend the plan as revised by the directors, because the plan had long been consummated by the time the stockholders had any knowledge of the revision.

2. Was the 1948 amendment of Section 14: 9-4 of the revised statutes of New Jersey as interpreted by the Circuit Court of Appeals unconstitutional in that it changed the requirements that a stockholder plan could only be modified, changed, altered or revised with the consent of two-thirds of the stockholders to permit a plan to be materially changed by the Board of Directors unless 51% of the stockholders objected to the revised plan. Thus

(a) Depriving stockholders of the protection of their voting rights.

(b) Depriving stockholders of their right to appraisal on the passage of a stockholder's plan, which was not approved by that stockholder.

3. Whether the Court of Appeals erred in rendering a decision in conflict with other circuits and decisions of this Court and the Courts of New Jersey in permitting the directors of the corporation to make a gift of corporate stock to another director.

4. Whether the Court of Appeals erred in rendering a decision in conflict with the decisions of the Courts in New Jersey and other jurisdictions in violation of Section 14: 8-9 of New Jersey Revised Statutes, which decision permitted the issuance of stock in exchange for a note upon which there was no personal liability and no other consideration of any kind.

STATEMENT OF THE CASE.

The facts of this case are not in dispute. On May 19, 1944, the Board of Directors of the Mengel Company passed a resolution granting to Alvin A. Voit, the President and a Director of the Company, an option to purchase 10,000 shares of the unissued common stock of Mengel Company at any time prior to December 31, 1949 at $10 per share. The option specifically provided that no part of the option might be exercised unless Mr. Voit was in the employ of the company at the time of its exercise. The resolution specifically provided that the option was not remuneration for services but was given as an incentive to the President.

In 1944 Section 14:9-1 *et seq.* required that any option plan had to be formulated by the Board of Directors and thereafter approved by two-thirds of the stockholders at a meeting called for that purpose. That any modification, revision, amendment, alteration or change had to likewise be approved by two-thirds of the stockholders.

In conformity with the statute, a meeting of stockholders was called and the resolution was approved by two-thirds of the stockholders at a meeting held on February 27, 1945, although approximately 36,000 shares of the total vote of 229,000 shares voted against the resolution.

Within a week thereafter, on March 6, 1945, Mengel Company filed with the New York Stock Exchange a Listing Application signed by Mr. Voit and this Application stated that (1) the cash to be received at the rate of $10 per share would be added to the general funds of the company and (2) $1 of the cash received from Mr. Voit was to be credited to capital and the remaining $9 would be credited to capital surplus (R. App. 34a, Exhibit C).

The option as approved by the stockholders in 1945 was never exercised by Mr. Voit. Approximately two months prior to the expiration date in October, 1949, the directors authorized a completely new plan which permitted Mr. Voit to exercise his option and purchase the 10,000 shares of stock by giving the corporation a demand note in the amount of $100,000. with interest thereon at 3% per annum. The resolution provided that Mr. Voit would not be personally liable upon the

note, but that the corporation would look solely to the collateral pledge for the payment of the note. As collateral for the payment of the note the corporation was to hold the 10,000 shares of stock as security, but the directors' resolution provided that all dividends on this stock were to be applied towards the payment of interest and the balance in excess of the interest requiremets was to pay the principal due on the stock. Under the resolution, Mr. Voit also had the privilege of withdrawing so much of the stock pledged as collateral as from time to time payments were made on the note. There was no requirement that Mr. Voit had to remain in the employ of the company in order to exercise the option. Shortly thereafter, Mr. Voit purportedly exercised this new option by giving his demand note upon which he was not personally liable in the sum of $100,000. to Mengel Co. At the time of the exercise of the option Mr. Voit did not have a contract of employment with Mengel & Co. nor did he at any time thereafter have a contract of employment with the company.

For a numbebr of years prior to 1949 the devidends paid on shares of stock were far in excess to the proposed interest requirements on the stock. For the year, 1949 and the years subsequent thereto the dividends on each share of stock varied between 2½ to more than 6 times the interest requirements on the stock.

During the pendency of these actions Mr. Voit acquired approximately 5,000 shares of the stock

through the application of dividend payments on the note.

In the proxy statement, dated April 4, 1950, the stockholders were informed "by action of the Board of Directors approved by the stockholders of the company on February 27, 1945, Mr. Voit was granted an option to purchase 10,000 shares of Common Stock of the company at $10.00 per share. Mr. Voit exercised this option on April 26, 1949. * * * The purchase price of $100,000 for this stock is evidenced by a demand promissory note dated October 26, 1949, executed by Mr. Voit, bearing interest at the rate of 3% per annum from date, payable semiannually. Certificates for the 10,000 shares of Common Stock have been issued in the name of Alvin A. Voit, but are held by the Company as security for the payment of the promissory note, above mentioned, it being provided in said promissory note that the Company shall look solely to the 10,000 shares of stock pledged as collateral for the payment of this note."

There is no disclosure to the stockholders that the option plan as approved by the stockholders in 1945 had been materially changed in October, 1949 by the Board of Directors so that instead of Voit paying $100,000 in cash upon the exercise of his option he was permitted to pay a note in the sum of $100,000.00 upon which he was not to be personally liable and the stock was issued to him.

Initially the District Court decided this case in favor of petitioner, finding that (a) there was a material variance between the original 1945 option

plan approved by the stockholders and the 1949 plan put into effect by the directors' resolution, (b) there was no full disclosure to the stockholders that the directors had materially changed the option granted by the stockholders, (c) the directors in effect authorized a gift of the stock to Mr. Voit of which the stockholders were unadvised (Findings of Fact and Conclusion of Law, filed August 4, 1953, App. 57a). Before summary judgment could be entered for petitioners the respondents called the Court's attention to a 1948 Amendment to New Jersey Statute 14:9-4 which provided that any plan previously adopted could be "amended or revised" by the directors of a corporation and any amendment or revision so made by the directors of a corporation could be changed or repealed by the stockholders (App. 78a). New Jersey Statute 14:9-2 still provides that any "modification" of a plan has to be approved by ⅔ of the stockholders (App. 1a).

Upon the basis of the revised statute 14:9-4 summary judgment for defendants was then entered by the District Court and the United States Court of Appeals for the Sixth Circuit affirmed.

REASONS FOR GRANTING THE WRIT.

This case involves novel and unsettled important questions of constitutional law and corporate law governing the exercise of option plans and the issuance of stock, and the construction of Rule 23(b) of the Rules of Federal Procedure (81a).

It will stand as a landmark of universal application as granting power to a Board of Directors to make a gift of options and of stock, and to permit the issuance of stock in violation of the customary statute requiring that the corporation receive value for its stock.

The decision if it is permitted to stand will necessarily upset all previous conceptions of the intepretation of Rule 23(b) of the Federal Rules of Procedure. Of necessity this interpretation of Rule 23(b) must affect the rights of all stockholders in every publicly held corporation in the United States. It will permit derelict directors to use Rule 23(b) as a shield from prosecution.

There is involved a constitutional question which transcends the importance of the case itself. The decision herein is in conflict with all prior decisions of this Court and the Courts in New Jersey which limit the right of a State to pass legislation (except as a necessary police power) which impairs the property rights of stockholders of a corporation. By its very nature the extension or modification of what has heretofore been the limitation of the powers of a State must affect hundreds of thousands of stockholders not only in the State of New Jersey, but in every State in the Union.

The principle that corporate directors may not make a gift of their assets to another director has universally been the law in this country. It has specifically been the law in the State of New Jersey and has continuously been followed in the Federal Courts. This

decision would became a landmark in corporate law to permit minority stockholders without their approval to be deprived of their property by their directors making a gift to another of their directors. This is contrary to all the decisions involving fiduciary law not only in the State of New Jersey, but in every Court of the country. Of necessity the principal at stake is of paramount importance in corporate law.

In practically every State there is a statute which prevents the issuance of stock in exchange for anything other than property or money. The decision in this case permitting the issuance of the stock to Mr. Voit in exchange for a note upon which no one is personally liable imperils the rights of stockholders and creditors in every publicly owned corporation in this country. The decision must act as a beacon light to corporations in the State of New Jersey and every other State to sanction the issuance of stock to an officer in exchange for a nonenforceable promise to pay. This is contrary to every decision in every Court.

The use of the corporate stock to produce dividends as a means of paying for the self-same stock has been held to be illegal in the cases cited hereafter. Consequently this decision is in conflict with the decisions in the Second Circuit and in every other State.

The decision grants summary judgment, because the petitioners have not as a prerequisite of instituting action secured from the stockholders such action as they desire. There is no decision upon the merits.

POINT I.

Rule 23(b) Does Not Require a Stockholder to Follow a Futile Procedure as a Requisite for Instituting Action.

In October, 1949, the directors' resolution permitted Mr. Voit to exercise his option by giving his demand note upon which he was not liable. When Mr. Voit exercised his option in October, 1949, the plan was consummated. Even under the Revised 14:9-4, N.J.R.S., there was in 1950 no plan in existence which the stockholders could alter or revise. Therefore, any request made to them would have been futile.

At the time of the stockholders' meeting in 1950, it was not revealed to the stockholders that the consummated plan was not in accordance with the plan passed at the stockholders' meeting in 1945, but was a revised plan adopted only by the directors. The stockholders never knew they had the right to alter or change the plan, because they did not know that it was a director's plan.

The 1949 revised plan of the directors constituted an option which created a gift to Mr. Voit, because Mengel received no consideration for the option. The issuance of the stock in exchange for a note upon which Mr. Voit was not liable was a gift of the assets of the corporation.

If the issuance was not a gift then the use of the stock to create dividends to pay for itself was the use of corporate assets for the benefit of Mr. Voit and was illegal (law, *post,* p. 17).

The issuance of the stock in exchange for the note upon Mr. Voit was not liable was illegal, because it violated Section 14:8-9 New Jersey Revised Statutes (law, *post*, p. 18).

If the exercise of the option constituted a gift or was illegal it could not be ratified by the stockholders, except unanimously. This is the law of New Jersey and the law as enunciated by this Court and every other jurisdiction.

Slutzker v. Rieber, 132 N. J. Eq. 406, 28 A. 2d 525;

Tooker v. National Sugar Co., 80 N. J. Eq. 305; 84 Atl. 10;

Fletcher Cyclopedia of Corporations, Section 764, page 807;

Von Arnim v. American Tube Works, 188 Mass. 515, 74 N. E. 680;

Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 N. E. 670;

Penn v. Robertson, 115 F. 2d 167 (C. A. 4);

Rogers v. Guaranty Trust Company, 288 U. S. 123, 53 S. Ct. 295, 77 L. Ed. 652;

Continental Security Company v. Belmont, 206 N. Y. 7, 99 N. E. 138;

Delaware & Hudson Company v. Albany & Susquehanna Railroad Co., 213 U. S. 435, 29 S. Ct. 540, 53 L. Ed. 862;

Kerbs v. California Eastern Airways, 90 Atl. 2d 652 (Del.).

Under the New Jersey law a stockholder need not seek action by other stockholders if the action of the directors cannot be ratified.

Endicott v. Marvel, 81 N. J. 378, 87 Atl. 232;
Slutzker v. Rieber, 132 N. J. 406, 28 A 2d 525.

The Federal Courts have uniformly held that it is not necessary to secure stockholders approval when such a demand would be futile.

Carruthers v. Jack Waite Mining Co., 14 F. R. D. 475 (S. D. N. Y.);
Steinberg v. Hardy, 90 F. Supp. 167 (Conn.);
Steinberg v. Adams, 90 F. Supp. 604;
In Re: Western Tool & Mfg. Co., 142 F. 2d 404 (C. A. 6);
Rogers v. Guaranty & Trust Co., 288 U. S. 123;
Delaware & Hudson Co. v. Albany & S. R. Co., 213 U. S. 435.

POINT II.

Section 14:9-1, *Et Seq.* as Amended and Interpreted Were Unconstitutional.

This Court and the Courts of New Jersey have held that the right to the protection of a two-thirds vote held by a minority stockholder cannot be diminished by a subsequent statute passed by the State, such legislation being prohibited by Article I, Section 10, United States Constitution which provides that no state may pass a law impairing the obligation of contracts.

See:

In re: Collins-Doan Co., 1 N. J. Super. 441, 61 A. 2d 913;

In re: Newark Library Ass'n, 64 N. J. L. 217;

Grupe v. Rudisill, 101 N. J. Eq. 145, 136 Atl. 911;

Vanden Bosch v. Michigan Trust Co., 35 F. 2d 643 (C. A. 6);

Coombes v. Getz, 285 U. S. 434;

Faunce v. Boost Co., 15 N. J. Sup. 534, 83 A. 2d 649.

The plaintiffs became stockholders subsequent to 1945 and prior to 1949. Their rights have been prejudiced, because the statute as interpreted by the Court of Appeals permits 51% of the stockholders to materially change an option plan, instead of the requirement that only 66⅔% of the stockholders could change the plan.

In addition, Section 14:9-3 (App. 2a) permits certain classes of stockholders to seek an appraisal upon the creation of an option plan. This class of stockholders is deprived of their appraisal rights, if they approved the original 1945 plan but did not desire to approve the directors plan passed in 1949.

The decision below to the effect that the 1948 amendment to the New Jersey Statute (14:9-4) (App. 3a) allows directors of a corporation to make major and radical changes in existing stock option plans can not be reconciled with the decisions of this Court in *Coombes* v. *Getz,* 285 U. S. 434, 441-442, holding that the reserve power of a State to repeal or alter laws pertaining to corporations is not unlimited and "neither

vested property rights or the obligation of contracts of third persons may be destroyed or impaired." If the amended statute had been construed by the Court below as petitioners contend it should be, then directors of a corporation could only make *minor* revisions in option plans and the constitutionality of the amended statute would not be questioned. By the decision below, the requirement of the necessity of a two-thirds vote of the stockholders to materially change or revise a plan was abolished and now the directors by resolution only could radically change a plan. As a result the stockholders were (1) deprived of their voting rights under N.J.S.A. 14:9-2 and their right to an appraisal of their stock value if they dissented, as provided in N.J.S.A. 14:9-3. Since N.J.S.A. 14:2-8 (App. 5a) provides that the New Jersey Corporation statutes become a part of the charter of every corporation, the State of New Jersey cannot impair the obligation of contract between the corporation and the stockholders contrary to Article I, Section 10, of the United States Constitution under the decision in the *Coombes* case.

The New Jersey Courts also recognize the restrictions of Article I, Section 10, of the United States Constitution in respect to the power of the State to make subsequent legislation effecting contract rights of stockholders. In *Grupe* v. *Rudisill,* 101 N. J. Eq. 145, 136 Atl. 911, the Court held that the rights of church members under the charter of the church requiring a vote of ¾ths of the members of the church for the sale of church property could not be overridden by a subsequent New Jersey Statute. To the same effect see

Faunce v. Boost Co., 15 N. J. Super. 534, 83 A. 2d 649, 652; *In Re* Collins-Doan Co., 1 N. J. Super. 441, 61 A. 2d 913, 915.

POINT III.

Both the Revised Option of 1949 and the Issuance of the Stock in 1949 Constitute a Gift of the Corporate Assets.

The sole problem in determining whether the transaction constituted a gift is whether at the time it was made the corporation was insured that it would receive any asset or whether Mr. Voit was obligated to suffer any liability or detriment.

Mr. Voit was not obligated to remain in the employ of the company subsequent to the granting of the option or after the purported exercise of the option. He was not obligated to make any payments on the stock. The corporation was not insured that it would ever receive payment for the stock or that it would receive anything for the granting of the option.

The highest Court in New Jersey has held that an option plan must be supported by some consideration.

Eliasberg v. *Standard Oil Co.*, 23 N. J. Super 431, 92 A. 2d 862.

The Courts have consistently held in New Jersey that gifts of the corporate property cannot be made to its directors without the consent of all of its stockholders.

Tooker v. National Sugar Refining Co., 80 N. J. Eq. 305, 84 Atl. 10;

Deuts, Presto, Kirche v. Presto of Elizabeth, 89, N. J. Eq. 242, 104 Atl. 642;

King Machine Co. v. Caparoso, 2 N. J. Super 230.

The principal enunciated has been approved by this Court in,

Rogers v. *Hill,* 289 U. S. 582.

Section 14:9-1 *et seq.* (prior to the 1948 amendment) was passed upon and a similar transaction was held to be a gift in,

Penn v. Robertson, 115 F. 2d 167 (C. A. 4).

The cases have unanimously held that the granting of an option without consideration constitutes a gift.

Kerbs v. California Eastern Airways, 90 A. 2d 652 (Del.);

Holthusen v. Edward G. Budd, Mfg. Co., 52 F. Supp. 125 (D. C. E. D. Penn.);

Rosenthal v. Burry Biscuit Corp., 30 Del. Ch. 299, 60 A 2d 106.

The directors could not permit Mr. Voit to use the corporate assets in order to pay for his stock.

Marcus v. Otis, 168 F. 2d 649 (C. A. 2);

Upson v. Otis, 155 F. 2d 606 (C. A. 2);

Bromschwig v. Carthage Marble & White Lime Co., 334 Mo. 319, 66 S. W. 2d 889;

Backus v. Finklestein, 23 F. 2d 357 (D. C. Minn.).

POINT IV.

The Issuance of 10,000 Shares of Stock Violated Section 14:8-9 of the New Jersey Revised Statutes and Was Therefore Illegal.

The issuance of the 10,000 shares of stock in exchange for a note upon which there was no personal liability did not comply with the requirement that stock shall be issued for "only cash or its equivalent and property including stock of another corporation * * *" (N.J.S.A. 14:8-9, App. 1a). In the instant case the corporation did not even receive a promise of future service in exchange for the issuance of its stock.

Since there was neither property or cash received by Mengel, under the New Jersey law and the law of all jurisdictions having similar statutes, the issuance of this stock was illegal.

Easton National Bank v. American Brick & Tile Co., 70 N. J. Eq. 732, 64 Atl. 917;

Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618;

Teehan v. United States, 25 F. 2d 884 (D. C. Mass);

Sohland v. Baker, 15 Del. Ch. 431, 141 Atl. 277;

Bank of Commerce v. Goolsby, 129 Ark. 416, 196 S. W. 803;

Holthusen v. Budd Mfg. Co., 52 F. Supp. 125 (D. C. E. D. Penn.).

The underlying public policy upon which this and similar statutes is predicated is that the corporation shall not issue stock without having received its value

in something other than its own stock in order to protect both the creditors of the corporation and stockholders from illegal manipulations of the management.

CONCLUSION.

For the reasons herein stated petitioners respectfully submit that this Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be granted. In the alternative, petitioners request that in the event this Petition is not granted, that this consolidated cause should be remanded to the United States Court of Appeals for the Sixth Circuit to await a final determination by the highest Court of the State of New Jersey as to the construction of N.J.S.A. 14:9-4 and related statutes.

Respectfully submitted,

ERNEST WOODWARD,
Attorney for Petitioner.

SIDNEY L. GARWIN,
L. LYNE SMITH, JR.,
Of Counsel.

May, 1955.

APPENDIX.

STATUTES.

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ARTICLE I, Section 10, United States Constitution. No state shall * * * pass any bill * * * or law impairing the obligation of contracts * * *.

New Jersey Revised Statutes, Title 1, Chapter 1, 1:1-1 5a

New Jersey Revised Statutes, Title 14, Chapter 2, 14:2-8. This title and all its amendments shall be a part of the charter of every corporation heretofore or hereafter formed hereunder, * * *..... 5a

New Jersey Revised Statutes, Title 14, Chapter 7, 14:7-1 ..... 5a

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PROCEEDINGS IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED.

February 1, 1955—Before Allen, Miller and Stewart, JJ.

This cause is argued by L. Lyne Smith, Jr., for appellants and by Leo T. Wolford for appellees and is submitted to the court.

JUDGMENT—Filed February 7, 1955.

This case came on to be heard upon the record and briefs and oral argument of counsel:

And it appearing that plaintiffs herein, minority stockholders in The Mengel Company, a new Jersey corporation, have filed a derivative action against the corporation and its president attacking the revision on October 21, 1949, of an option by the corporation's directors without approval of the stockholders;

And it appearing that said revised option provided in substance for the sale to the president of 10,000 shares of unissued common stock of the corporation to be paid for by the president's demand note for $100,000, the stock to be pledged as collateral, the dividends paid on such shares to be applied to payment on the note, and the corporation to have no recourse against the president on the note except to the extent of the stock deposited as collateral;

And it appearing that on October 26, 1949, the president exercised the option in accordance with the terms thereof;

And it appearing that the stockholders were fully apprised through the proxy dated April 4, 1950, sent them for the stockholders' meeting, of the terms of the said revised option;

And it appearing that said revised option was authorized by 14:9-1(a) Revised Statutes of New Jersey, 1937, and by 14:9-4 as amended in 1948, Revised Statutes Cumulative Supplement, New Jersey, 1948;

And it appearing that while, under the amended statute of 1948 the revised option was subject to be altered, changed or repealed by the stockholders, no such action was taken by the stockholders;

And it appearing that plaintiffs made no earnest and honest effort to secure from the stockholders such action as they desired, Cf. Rule 23(b) Rules of Civil Procedure; *Long* v. *Stites,* 88 Fed. 2d 554 (C. A. 6);

And it appearing that plaintiffs' explanation that they made no effort to secure such action from the stockholders upon the ground, among others, that they were widely scattered and that there would be expense and delay incident to such demand, is legally insufficient. *Bruce & Co.* v. *Bothwell,* 8 F.R.D. 45. Cf. *Stone* v. *Holly Hill Fruit Products, Inc.,* 56 Fed. 2d 553 (C.A. 5):

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed for the reasons stated in the findings of fact and conclusions of law of the District Court entered January 13, 1954.

PETITION FOR REHEARING—Filed March 10, 1955.

ORDER DENYING REHEARING—Filed March 25, 1955.

The petition for rehearing is denied.

APPENDIX

APPENDIX

STATUTES

New Jersey Revised Statutes (General Corporation Law) 14:8-9

Only *cash or its equivalent* and property, including stock of another corporation * * * shall be considered as payment of any part of the capital stock of any corporation organized under this title. (L. 1896, C. 185, No. 48)

14:9-1 EMPLOYEES' STOCK PARTICIPATION; ACQUISITION OF STOCK; SHARING PROFITS; FURNISHING BENEFITS; ELECTING DIRECTORS.

Any stock corporation formed under any law of this state may, upon such terms and conditions as may be determined in such manner hereinafter designated, provide and carry out a plan or plans for any or all of the following purposes:

a. The issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf, and the payment for such stock in installments or at one time, with or without the rights to vote thereon pending payment therefor in full, and for aiding any such employees and other persons in paying for such stock by contributions, compensation for services, or otherwise.

14:9-2 EXERCISE OF PRIVILEGES AND POWERS; PROVISION IN CHARTER; FORMULATION OF PLANS AND SUBMISSION TO STOCKHOLDERS.

Any of such privileges and powers may be exercised by including appropriate clauses therefor in the original articles of incorporation or in the by-laws at the time of organizing the corporation, or, where the corporation has been formed without such charter or by-law provisions, *the board of directors shall first formulate such plan and pass a resolution declaring that in its opinion the adoption thereof is advisable, and calling a meeting of the stockholders to take action thereon.* The stockholders' meeting shall be held upon such notice as the by-laws provide, and in the absence of such provisions upon ten day's notice given personally or by mail. If two-thirds in interest of each

class of stockholders present at the meeting and voting shall vote in favor of any such plan *or any modification thereof,* it shall thereupon become operative.

14:9-3 Dissenting Stockholder; Appraisal Of Stock; Transfer Of Stock.

In case any corporation shall adopt a plan providing for the issue of new stock under paragraphs "a" and "b" of Section 14:9-1 of this title, or any plan provided for in paragraph "d" of said section 14:9-1, any stockholder holding stock issued by such corporation before April fifteenth, one thousand nine hundred and twenty, not voting in favor of the plan, may, within thirty days after the adoption thereof, file with the Secretary of the company a dissent in writing therefrom.

The person so dissenting shall, within ten days after the filing of such dissent, and upon five days' notice to the corporation, apply by petition to the circuit court of the county in which the corporation has its principal office, for the appointment of three disinterested appraisers to appraise the fair value of the stock held by such stockholder and issued prior to April fifteenth one thousand nine hundred and twenty, without regard to any depreciation or appreciation thereof in consequence of the adoption of the plan, whose award, or that of a majority of them, when confirmed by such court, shall be final and conclusive on all parties.

The corporation shall pay to such stockholder the value of such stock as aforesaid. On receiving such payment, or on a tender thereof, or in case of any legal disability or absence from the state, on the payment of the award into such court, the stock shall be transferred to the corporation, to be disposed of by the directors or to be retained for the benefit of the remaining stockholders.

In case the award is not paid within thirty days from its filing and confirmation by the court and notice thereof given to the corporation, in the manner aforesaid, the amount of the award shall be a judgment against the corporation, and may be collected as other judgments in such

court are collected. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise.

The charges and expenses of the appraisers and appraisal as approved by the court shall be paid by the corporation.

The corporation may, at any time before the proceedings hereinbefore mentioned are instituted or completed, elect to permit the dissenting stockholder to subscribe for his proportionate share of such new stock issued under paragraph "a" and "b" of Section 14:9-1 of this title, in which event such proceedings shall not be instituted, or, if instituted, shall be terminated upon the payment of the appraisal expenses as aforesaid by the corporation.

14:9-4 Change Of Plans.

Any plan so adopted may be recalled, abolished, revised, amended, altered or changed in the same manner as is herein provided for its adoption, subject, however, to the restoration by the corporation of any moneys contributed by employees or those actively engaged in the conduct of the corporate business, and for which no stock or other equivalent has been issued.

14:9-4 (As amended) Recalling, Amending Or Revising Plans; Alteration Or Repeal By Stockholders.

Any plan so adopted *may be recalled or abolished in the same manner as is herein provided for its adoption,* subject, however, to the restoration from any trust fund created by such corporation for carrying out or effectuating any such plan, or by the corporation if no such trust fund has those actively engaged in the conduct of the corporate busibeen created, of any moneys contributed by employees or ness, and for which no stock or other equivalent has been issued.

Any plan heretofore adopted or which may hereafter be adopted by any corporation of this State *may be amended or revised* by the board of directors of the corporation by resolution of said board; provided, however, that no such

New Jersey Revised Statutes

amendment shall be effective which shall attempt to (1) deprive any employee of any shares of the capital stock of the corporation which he may have acquired through or as a result of said pension plan; (2) deprive any employee of his right to participate in the profits of the corporate enterprise or any branch or division thereof; or (3) divert any part of the fund whether corpus or income which may have been set up by the corporation to provide for the payment to or for the benefit of the employees of the corporation, or any corporation a subsidiary thereof or affiliated therewith, of pensions during old age, disability or unemployment or for the relief or general welfare of any or all of such employees.

Any amendment to or revision of the plan so made by the directors of the corporation *may be altered, changed, or repealed by the stockholders.* (As amended L. 1948, c. 93, p. 530, Sec. 1. Effective May 28, 1948.)

14:11-1 AMENDMENTS OR CHANGES AFTER ORGANIZATION * * *

Any corporation organized under this title * * * may, in the manner provided by section 14:11-2 of this title: * * *

(e) Increase its capital stock;

(o) Provide for the creation and issuance of optional rights to subscribe to stock.

14:11-2 PROCEDURE.

The Board of Directors shall pass a resolution declaring that such amendment, change or alteration is advisable *and calling a meeting of the stockholders to take action thereon.* * * *

If two-thirds in interest of each class of stockholders having voting powers shall vote in favor of such amendment, change or alteration, the corporation shall make a certificate thereof under its seal and the hands of its President or Vice-President and Secretary or Assistant Secretary, which certificate shall be acknowledged or proved as in the case of deeds of real estate, and shall be filed in the

New Jersey Revised Statutes

office of the Secretary of State. Thereupon, the certificate of incorporation shall be deemed to be amended accordingly, * * *.

The certificate of the Secretary of State that such certificate has been filed in his office shall be taken and accepted as evidence of such amendment, change or alteration, in all Courts and places. (L. 1896, c. 185, Sec. 27) (As amended L. 1931, c. 220, Sec. 1).

14:2-8 Charter Governed by Provisions of Title.

This title and all its amendments shall be a part of the charter of every corporation heretofore or hereafter formed hereunder, * * *

14:7-1 Board of Directors; Conduct of Business By.

The business of every corporation shall be managed by its board of directors, not less than three in number. * * *

New Jersey Revised Statutes, Title 1, Chapter 1.

1:1-1 General Rules of Construction.

In the construction of the laws and statutes of this State, both civil and criminal, words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the Legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language. Technical words and phrases, and words and phrases having a special or accepted meaning in the law, shall be construed in accordance with such technical or special and accepted meaning.

IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY.
AT OWENSBORO.

DOCKET ENTRIES.

Civil 2107

Arthur Haffer and Hilda D. Haffer, suing on behalf of themselves and all other stockholders of The Mengel Company similarly situated,

v.

Alvin A. Voit and
The Mengel Company

1951		
April 30	Petition filed, transferred from Southern District of New York	$15.00
30	Original summons issued at New York Mar. 19, 1951, executed on The Mengel Company through S. G. Curtis, Eastern Sales Representative, Mar. 20, 1951.	
30	Motion for Order transferring to Western District of Kentucky.	
30	Copy of Order changing returnable date from April 3rd to April 13th at NYC. Original affidavit of service of Show Cause Order. Order to show cause and affidavit of Harold Harper, Atty. Certified copy of Order transferring to Kentucky, Signed Sylvester J. Ryan, U.S. Judge. Certified copy of Docket entries.	

Defendant Mengel to have ten days after receipt by Clerk of Court at Louisville, Ky. to answer herein.

1951

May	7	Motion of Mengel for time to answer.
	7	Order allowing Mengel until May 25, 1951.
	24	Mengel answer filed.
	24	Mengel motion to require Plaintiffs to give security for reasonable expense, fees, etc.
	24	Mengel motion to dismiss and statement in support.
Oct.	3	Called. Greenebaum, new counsel, asked time.
	24	Summons executed on Amended Complaint as the Mengel Company and Alvin A. Voit. U S M $4.50
Dec.	12	Motion of S. L. Greenebaum to withdraw as counsel set for Dec. 27. Notice to be given by Attorney.
	27	Notice, Motion and Certificate and Order to withdraw, on counsel's own motion, S. L. Greenebaum as attorney for Plaintiffs.
	31	Set for Jan. 4 on motions—changed to Jan. 22, 1952, on motions. Copy of Order mailed to Israel Beckhardt and Charles G. Middleton, Attorneys. Changed to 2 p.m.

1952

Jan.	18	Pre-brief explanation filed by Mengel.
	18	Statement of Facts filed by Mengel.
	18	Answer filed by Mengel.
Mar.	12	Called and passed.
	12	Second Amended Complaint filed.
April	22	Answer to Second Amended Complaint filed.
Oct.	8	Called. Brief to be filed. Passed. (with 2228)

1953

Jan.	9	Order consolidating for all purposes 2107-2228.
	9	Sam Greenebaum withdrew as counsel for plaintiffs. Lyne Smith, Jr., substituted as co-counsel with Israel Beckhardt.

Docket Entries

1953		
Aug.	4	Findings of Fact and Conclusions of Law filed.
	21	Informal request to change Conclusions of Law filed.
Sept.	23	Supplemental affidavit of C. O. Meloy, Secretary, The Mengel Company, filed.
	23	Brief of Defendants on informal request for Court to change Conclusions of Law filed.
Oct.	30	Plaintiffs reply brief to Defendants brief on request for change.
	30	Plaintiffs motion to file Ex. E and Order.
1954		
Jan.	13	Revised and Supplemental Findings of Fact and Conclusions of Law by Judge Shelbourne.
	14	Order that Defendants' Exhibits set forth be designated and made part of record in the Consolidated Actions 2107-2228.
	14	Order re plaintiffs Exhibits.
	14	Judgment entered. Plaintiffs' motion for summary judgment overruled. Defendants' motion for summary judgment sustained. Both 2107 and 2228 dismissed. Defendants to recover their costs. Execution allowed.
		CLOSED
1954		
Jan.	20	Motion to amend Findings of Fact and Law and to amend judgment, filed by plaintiffs.
	28	Defendants response to above motions filed.
	28	Affidavit of C. O. Meloy filed, as Ex. No. 11. Hearing in Chambers on Motion. Order overruling Motion.
		CLOSED
1954		
Feb.	4	Notice of Appeal filed. Copy mailed Edwin Middleton.
	4	Order granting time to April 27th for filing.

DOCKET ENTRIES.

Civil 2228

Ann F. Ames,

v.

Alvin Voit,
Albert L. Entwistle,
"Walter" T. Green, first name ficitious and unknown to plaintiff;
Dulaney Logan,
The Mengel Company, et al.,

1951

Oct.	4	Complaint filed	$15.00
	4	Summons issued	
	8	Summons returned endorsed executed on Chas. G. Middleton, U S M fee $2.00.	
	10	Summons returned endorsed executed on Entwistle; V. P. Mengels and Logan. Unexecuted on Edw. Lane. U S M fee $7.70.	
	12	Summons returned endorsed executed on Albert L. Entwistle; Alvin A. Voit; Walter T. Green. U S M $8.40.	
	25	Motion for The Mengel Co. to require Plaintiff to give security for reasonable expenses, counsel fees etc. Affidavit in support of Mengel's motion to dismiss and the Motion to Dismiss.	
	25	Motion of The Mengel Co. for order staying proceedings herein until Plaintiff pays costs $115.50 in U. S. Court, Southern District of New York, in which Plaintiff sued Mengel on same cause of action.	

Docket Entries

Dec. 31	Passed to be heard on motions at 10 a.m. Jan. 22, 1952.
1952	
Jan. 7	Motion for summary judgment filed by Plaintiffs; affidavits of Sidney L. Garwin (2) filed. One in support of Motion for summary; one in opposition to Motion to dismiss on ground another action pending, etc.
18	Pre-brief explanation filed for Mengel. Statement of facts filed for Mengel. Answer of Mengel filed.
21	Plaintiff's memo filed.
22	Affidavit of Chas. G. Middleton filed.
Mar. 12	Called and passed.
Aug. 26	Brief for Plaintiff (Mr. Lyne Smith took to Judge after stepped).
1953	
Sept. 8	Reply brief for defendants filed and placed with record.
Oct. 8	Called and passed.
Jan. 9	Order consolidating for all purposes. Response to Defendants reply brief filed.
20	Reply to Plaintiffs response Brief filed.
Mar. 11	Called. Pending on motion for summary.
Aug. 4	Findings of Fact and Conclusions of Law, filed.
21	Informal Request before Judgment for the Court to change its Conclusions of Law holding that Board of Directors did not conform to N. J. Statutes in granting Voit the option, etc.
Sept. 23	Supplemental affidavit of C. O. Meloy, Secretary of Mengel Co.
23	Brief for Defendants on their Informal Request for the Court to change its conclusions of Law, filed, handed to MS.
Oct. 30	Motion to file Plaintiffs' Exhibit "E" filed-order entered filing plaintiffs Exhibit "E" as part of record herein.
1954	
Jan. 13	Revised and Supplemental Findings of Fact and Conclusions of Law.

Docket Entries

	14	Order for Defendants exhibits.
	14	Order re Plaintiffs exhibits.
	14	Judgment entered. Defendants motion for summary judgment sustained. Consolidated actions 2107 and 2228 dismissed; defendants to recover costs. Execution may issue.
		CLOSED
1954		
Jan.	20	Plaintiffs motion to amend Findings, Conclusions and Judgment filed.
	28	Motion overruled. Heard in Chambers.
Feb.	4	Notice of Appeal filed by Lyne Smith, Jr., Attorney.
	4	Copy of Notice of Appeal mailed Defendants counsel.
	4	Order extending time for docketing record on appeal to April 27, 1954.

In the

UNITED STATES DISTRICT COURT

For the Western District of Kentucky
At Louisville

Ann F. Ames, - - - - - - - - - Plaintiff,

v.

Alvin A. Voit,
Albert L. Entwistle,
"Walter" T. Green, first name being fictitious and unknown to plaintiff,
Dulaney Logan,
The Mengel Company, (all of above at 4th & Colorado Sts. Louisville, Kentucky),
Charles G. Middleton, (501 S. 2nd St., Louisville, Kentucky) and
Edward Lane (c/o The Mengel Company, 4th & Colorado Sts., Louisville, Kentucky), - Defendants.

COMPLAINT—Filed Oct. 4, 1951.

Plaintiff, complaining of the defendants, brings this action respectively on behalf of herself and all other stockholders of The Mengel Company similarly situated and alleges upon information and belief except as to paragraphs 1a, 1b and 2.

1. (a) Jurisdiction herein is based upon diversity of citizenship. This suit is not a collusive one to confer upon this Court jurisdiction of an action of which it would not otherwise have jurisdiction.

(b) Plaintiff is a citizen of the State of New York.

(c) The individual defendants are citizens of the State of Kentucky or the State of Virginia.

(d) The defendant The Mengel Company is a foreign corporation duly organized and existing under the laws of the State of New Jersey and is doing business in the State of Kentucky.

(e) The matter in controversy exclusive of interest and costs exceeds $3,000.00.

2. Plaintiff has been at all times since the 31st day of July, 1947, and now is the owner and holder of the common stock of The Mengel Company (hereinafter called the Corporation).

3. On January 22, 1945, the Corporation sent to its stockholders, a notice of a special meeting of stockholders to be held on February 27, 1945. One of the purposes of said meeting was to take action on a resolution of the Board of Directors adopted at a regular meeting held May 19, 1944 granting to Alvin A. Voit an option to purchase from the Corporation at any time and from time to time on or before December 31, 1949 at $10.00 per share, 10,000 shares of the unissued common stock of the Corporation of the par value of $1.00 per share.

4. The proxy solicitation material sent with said notice discloses that the Charter of the Corporation authorizes it to issue additional stock only upon the consent of 2/3 of the stockholders present at said meeting and that the issuance of said stock must be approved by the necessary governmental authorities.

5. On or about the 27th day of February, 1945, at a special stockholders meeting called for that purpose upon consent of 2/3 of the stockholders present at said meeting there was granted to the defendant Alvin A. Voit an option to purchase 10,000 shares of common stock of the Corporation at $10.00 per share which option expired on the 31st day of December, 1949. Said option was given upon the express condition that no part of it could be exercised unless the defendant Voit was still in the employ of the Corporation.

6. On the 21st day of October, 1949, the Board of Directors of the Corporation authorized the issuance of the

10,000 shares of stock to the defendant Voit for a purchase price of $100,000.00 payable by a demand promissory note in that amount bearing 3% interest payable semi-annually it being specifically provided however, that "the corporation was to have no recourse against the maker of the note except to the extent of the stock deposited as collateral security therefore".

7. On the 26th day of October, 1949, the defendant Voit attempted to exercise his option to purchase 10,000 shares of the common stock of the Corporation by giving as payment therefor, a note for $100,000.00 payable on demand with interest at 3% per annum payable semi-annually. Said note was secured by the 10,000 shares of the Corporation common stock which was purchased by the defendant Voit with the privilege of withdrawing the collateral from time to time by making payments on the principal at the rate of $10.00 cash with each share withdrawn. The note further provided that "the Corporation shall look solely to the collateral placed for the payment of this note". The note further provided that the dividends on the shares held as security were to be applied first towards the payment of interest and second towards the payment of principal.

8. The purported exercise of said option was illegal, invalid, null and void in that

(a) there was a failure to pay for said stock in accordance with the terms of the option or in any other way that constitutes payment and in addition there was a failure by Alvin A. Voit or anyone on his behalf to obligate themselves to pay for said stock at some future date.

(b) the consent of 2/3 of the stockohlders present at the meeting of February 27, 1945, was obtained on the premise that said option could only be exercised by payment for the stock in cash on or before December 31, 1949 and said stock has not been paid for as of the date hereof.

(c) the Charter of the Corporation provides that the consent of 2/3 of the stockholders must be obtained as a condition prerequisite to the issuance of unissued stock. Said stock had remained unissued as and until the

26th day of October, 1949 and 2/3 of the stockholders of the Corporation have not at any meeting called for that purpose or in any other manner authorized a transfer of the stock without payment of consideration, or upon the terms set forth in paragraphs 6 and 7 of this complaint.

(d) that the governmental approval of the solicitation material was given upon the premise that the option would be exercised by payment in cash on or before December 31, 1949.

(e) the laws of the State of New Jersey require that the consent of 2/3 of the stockholders must be obtained as a condition prerequisite to the issuance of unissued stock of the Corporation and the consent of 2/3 of the stockholders of the Corporation has not been obtained to authorize a transfer of the stock upon the terms set forth in paragraphs 6 and 7 of this complaint.

9. All of said 10,000 shares of common stock of the Corporation is at the present time, in the possession and under the control of the Corporation.

10. During the year 1950 there was declared as dividends the sum of $1.05 on each share of common stock which was 75c more per share than was due as interest on the loan. At the dividend declaration on November 17, 1950, the Corporation declared that the regular quarterly dividend rate would be 50c per share. Since that date and in accord with said declaration two quarterly dividends have been declared for the year 1951 each in the sum of 50c per share. This will constitute a payment of $2.00 per share yearly. This will permit the defendant Voit to completely pay for the 10,000 shares of stock over a period of years without any money being expended by him and without any investment or financial risk and solely with the funds of the Corporation.

11. All of the dividends accrued upon the 10,000 shares of common stock of the Corporation are in the possession and under the control of the Corporation.

12. All of the acts of the Corporation and of its officers and directors which permitted the option to be exercised for the purchase of the 10,000 shares of stock in exchange

for a demand promissory note in the sum of $100,000.00 upon which the maker was not liable and upon which the Corporation could only assert its claim for payment against the collateral given with the note were designed to and will permit the defendant Voit to obtain profits from the stock, without risk, or financial investment upon his part. The effect of permitting the defendant Voit to receive dividends on the stock prior to payment will be to cause the Corporation to use its funds for the payment of the stock purchased from it.

13. Subsequent to said purported purchase of the shares of stock of the Corporation by Voit said stock has sold on the New York Exchange at 21½.

14. The acts of the Board of Directors in authorizing the issuance of 10,000 shares of the stock of the Corporation in exchange for the $100,000.00 note of Alvin A. Voit upon which he was not personally liable, were designed to and constituted a waste and spoliation of the corporate assets.

15. Unless enjoined by this Court the consummation of the purchase of the 10,000 shares of stock and the payment of the dividends upon said stock will result in irreparable injury to the Corporation,

(a) because it will result in grave financial loss to the Corporation and permit the stock to be used as a means of financial gain by defendant Voit with all possibility of loss devolving upon the Corporation.

(b) because it will permit the defendant Voit to collect dividends in excess of any possible interest payable upon his note and this permits him to receive large sums of money by the use of the corporate assets.

(c) because said purchase and sale is in contravention of the terms under which the option was originally granted by the stockholders of the Corporation to the defendant Voit.

(d) by honoring Voit's exercise of his purported option rights or by accepting payment therefor the Corporation will acknowledge its validity.

(e) thereafter the Corporation's Board of Directors will not demand or ask for an accounting by Voit for his profits and the Corporation's loss.

16. Annexed hereto, marked "Exhibit A" and made a part hereof with same force and effect as if herein set forth at full length, is a list of the directors and officers of the Corporation who served as such during the periods indicated opposite their names.

17. Plaintiff has no adequate remedy at law.

18. Plaintiff has not requested the Corporation or its Board of Directors to bring action against the individual defendants to enjoin the consummation of the acts complained of because,

(a) a majority of the Corporation's present directors have participated in the wrongs herein alleged.

(b) all the Corporation's present directors have full knowledge of the wrongs herein alleged and have in bad faith failed and refused to seek redress therefor.

(c) all the Corporation's present directors are hostile to the interest of its stockholders.

(d) any action instituted by the Corporation to redress the wrongs herein alleged would be in friendly hands and could not be properly and diligently prosecuted.

19. Plaintiff has made no demand upon the stockholders of the Corporation to bring this action because of the large number of such stockholders who reside in a wide area, the expense and delay incident to such demand and the fact that such a demand would entail a proxy fight with great and burdensome cost and expense and, furthermore, would be opposed by the present entrenched wrong-doing management dominated and controlled by the wrong-doers herein; said management as such has control of the proxy machinery and thus effectively and practically controls stockholders' meetings.

Wherefore, plaintiff demands judgment against the defendants and each of them as follows:

1. That a judgment and decree be entered directing a recision of the transaction complained of in this complaint

and directing the defendant Alvin A. Voit to reconvey and retransfer to The Mengel Company all the 10,000 shares of stock of The Mengel Company and to account for and to turn over and to pay to The Mengel Company all dividends and other income paid on said 10,000 shares of stock since that date.

2. That a judgment and decree be entered directing that upon such restoration in full, being made by defendant Alvin A. Voit, the defendant The Mengel Company shall return to Alvin A. Voit the note upon which he was not personally liable which he used to pay for said assets.

3. That a judgment and decree be entered directing the defendants to repay to The Mengel Company the amount of loss sustained by The Mengel Company or the amount of profit secured by Alvin A. Voit, whichever shall be greater as a result of the aforesaid action.

4. The plaintiff asks for such other and further relief as to the Court may seem just and proper together with a suitable allowance for counsel fees and the cost and disbursements of the action.

L. Lyne Smith, Jr.,
Address:
Woodward, Hobson & Fulton,
1805 Ky. Home Life Bldg.,
Louisville, Ky.,

Sidney L. Garwin,
225 Broadway,
New York, N. Y.,
Attorneys for Plaintiff.

MOTION TO DISMISS—Filed Oct. 25, 1951.

The defendants, Alvin A. Voit, Albert L. Entwistle, Warren T. Green (erroneously called Walter T. Green in the Complaint), Dulaney Logan, The Mengel Company, Charles G. Middleton and Edward Lane, move the Court for an order dismissing the Complaint herein on the following grounds, and each of them, to-wit:

1. As shown by the allegations of the Complaint, neither the plaintiff nor all of the defendants are citizens or residents or inhabitants of the State of Kentucky.

2. The matter in controversy, exclusive of interest and costs, does not exceed the sum of Three Thousand ($3,000.00) Dollars.

3. The plaintiff has an adequate remedy at law, if she is entitled to any remedy on account of the matters complained of herein, without resorting to the extraordinary remedy of injunction. In such action the Court does not have jurisdiction because the plaintiff cannot possibly recover the sum of Three Thousand ($3,000.00) Dollars for herself. In an earlier action in which the plaintiff sought to recover of The Mengel Company on the claim that she was denied her preemptive rights by reason of the matters set out in the Complaint herein, it was adjudged that the United States District Court did not have jurisdiction of such suit. Such earlier action is reported as Ames v. Mengel Co., et al., 190 Fed. 2d 344. Such earlier action is an adjudication binding on the plaintiff to the effect that the United States District Court does not have jurisdiction to entertain this suit.

4. There is another action pending in this Court styled Arthur Haffer, et al v. Alvin A. Voit and The Mengel Co., Civil Action No. 2107, which is an earlier action and in which the plaintiffs attempt to sue on behalf of all stockholders of The Mengel Company to recover on account of the matters set out in the Complaint herein. Such earlier action involves the same parties and is based upon the same cause of action as set out in the plaintiff's Complaint herein.

5. As to all members of the class for whose benefit this action is attempted to be brought other than the named plaintiff, Ann F. Ames. This is a spurious class suit in which the claims, if any, of the various stockholders are separate and distinct, and there is no basis in law for the plaintiff to represent the other stockholders of The Mengel Company.

Chas. G. Middleton,
Louis Seelbach,
Edwin G. Middleton,
Leo T. Wolford,
Counsel for the Defendants.

MOTION FOR SUMMARY JUDGMENT—
Filed Jan. 7, 1952.

Plaintiff, Ann F. Ames, moves the Court for Summary Judgment on the pleadings herein.

L. Lyne Smith, Jr.,
Address:
Woodward, Hobson & Fulton,
1805 Ky. Home Life Bldg.,
Louisville 2, Kentucky,
Attorney for Plaintiff.

UNITED STATES DISTRICT COURT
Western District of Kentucky
Civil 63-155

Ann F. Ames, - - - - - - - Plaintiff,

v.

Alvin A. Voit,
Albert L. Entwistle,
"Walter" T. Green, first name being fictitious
and unknown to plaintiff,
Dulaney Logan,
Charles G. Middleton,
Edward Lane, and
The Mengel Company, - - - - Defendants.

AFFIDAVIT OF SIDNEY L. GARWIN—
Filed January 7, 1952.

State of New York }
County of New York } ss:

Sidney L. Garwin, being duly sworn, deposes and says:

I am the attorney for the plaintiff. This affidavit is made in support of plaintiff's motion for summary judgment. This affidavit is made by me because I have personally examined the books, records, documents and data upon which this motion for summary judgment is based.

This is a derivative action brought by the plaintiff on behalf of The Mengel Company (hereinafter "Mengel") to compel a rescission of a sale of 10,000 shares of stock of Mengel and to compel Alvin A. Voit to reconvey to Mengel 10,000 shares of its stock and to account for all dividends and other income paid on said 10,000 shares of stock since the date of the sale.

Affidavit of Sidney L. Garwin

The alleged sale arose in the following manner: an option was granted in 1945 by the stockholders of Mengel to Alvin A. Voit to purchase 10,000 shares of the corporate stock at $10.00 per share. Said option had to be exercised on or before December 31, 1949. This option to purchase unissued stock required the consent of 2/3 of the stockholders. Subsequently in October, 1949, the option was purportedly exercised by Voit by giving a note in the sum of $100,000.00 in payment of the stock. The note provided that Voit was not to be personally liable upon it but that the 10,000 shares of stock purchased which was given as collateral would be primarily liable until the note was paid. The dividends were payable to Voit. Each year these dividends exceed the interest payments. All of the stock and the dividends are still in the possession of the corporation.

This motion for summary judgment is based upon the following facts:

On January 22, 1945, Mengel sent a notice of a special meeting of common stockholders to be held on the 27th day of February, 1945 to, among other things,

> "take action on resolutions of the Board of Directors adopted at a regular meeting held May 19, 1944, * * * granting to Mr. Alvin A. Voit, President of the company, an option to purchase from the Company at any time, and from time to time, on or before December 31, 1949 at $10.00 per share * * *, not exceeding 10,000 shares of the unissued Common Stock of the Company of the par value of $1.00 per share, of which 50,000 shares had previously been reserved for issuance, but none issued, to officers and certain other employees at a net cost to them of $10.00 per share, under the terms of a Stock Purchase plan which expired June 30, 1942."

The proxy statement disclosed that on May 19, 1944 the Board of Directors of Mengel passed resolutions granting an option by the company to Alvin A. Voit to purchase 10,000 shares of the unissued $1.00 par value common

stock of the company at any time prior to December 31, 1949 at $10.00 per share. The proxy solicitation material further states that,

> "the resolution granting the option must be approved by 2/3 in interest of the common stockholders present at the special meeting thereafter to be valid. The option must be approved by the necessary Governmental authorities."

A copy of the proxy solicitation material in so far as it relates to the option to Mr. Voit is annexed hereto Marked Exhibit "A" and made a part hereof. A copy of the resolution of the Board of Directors of Mengel adopted May 19, 1944 is annexed hereto marked Exhibit "B" and made a part hereof.

At the meeting of the stockholders of Mengel held February 27, 1945 the action taken by the Board of Directors with respect to said option was approved.

Mengel, its directors, Voit and the stockholders obviously understood that the option would only be exercised by Voit by payment in cash. This is evident from a listing application filed with the Department of Stock List, New York Stock Exchange "A-11978 on March 6, 1945. At page 1 and 2 thereof it states

> "the entire amount of cash to be received at the rate of $10.00 per share upon exercise of said option (Voit's option) will be added to the general funds of the company and used for any corporate purpose for which said funds may be devoted."

This listing application is signed by Voit as President of Mengel. A copy of so much of the listing application as refers to the exercise of the option granted to Alvin A. Voit is annexed hereto marked "Exhibit C" and made a part hereof.

On the 21st day of October, 1949 the Board of Directors passed a resolution authorizing issuance of 10,000 shares of stock of the company in exchange for a $100,000.00 note payable on demand with interest at 3% per annum payable

semi-annually. The resolution further provided that the dividends on the shares held as security were to be applied first towards the payment of interest and second towards the payment of principal and that the 10,000 shares of stock shall be secured by pledging the 10,000 shares of Mengel. The resolution further provided that Voit would not be personally liable upon the note but that Mengel would look only to the collateral pledged for the payment of the note.

On October 26, 1949 Voit purportedly exercised the option by giving his demand note in the sum of $100,000.00 to the company which was secured by the 10,000 shares of stock of Mengel. The note specifically provided "the company shall look solely to the collateral pledged for the payment of this note." A copy of the note is annexed hereto marked Exhibit "D" and made a part hereof. The note provided that Voit was to pay 3% interest per year but was to be credited for all dividends received by him.

During the period since October 26, 1949 Voit has been credited with dividends in the following amounts per share:

1950	March	15c
	June	15c
	Sept.	25c
	Nov.	50c
1951	March	50c
	June	50c
	Sept.	50c

In connection with the dividend payment in November, 1950, it was represented that the 50c declared at that time was the new quarterly rate and that this rate would be followed for the next quarter. As a matter of fact as has been disclosed Mengel has been paying dividends for this year at the rate of $2.00 per share so that if it continues in effect Voit will be credited each year with $20,000 per year in dividends and will pay $3,000.00 per year in interest so that at the end of six years he shall have received the entire 10,000 shares of stock without having invested a single penny and without having subjected himself to any

financial risk. The corporation will merely have exchanged the stock for a possibility of levying upon the same stock in the event the price went below $10.00 per share.

At all of the times hereinbefore mentioned the by-laws of Mengel, Article 11 provided as follows:

> "the company shall not increase its capital stock unless thereunto authorized by a vote and the written assent of 2/3 in interest of the stockholders."

The only assent that the stockholders gave for the issuance of 10,000 shares of stock was a conditional one on February 27, 1945 under which they authorized issuance of the stock provided that Voit exercised his option prior to December 31, 1949 by paying in cash the sum of $100,000.00. The time to exercise said option in the manner prescribed by the stockholders has expired. Since the purported exercise of the option the stock has been quoted on the New York Stock Exchange at a high of 21½.

Originally a representative action on behalf of this plaintiff against Voit and defendant Mengel was commenced in the United States District Court for the Southern District of New York. That action sought to recover damages suffered individually by the plaintiff as a stockholder. It did not seek to recover damages sustained by the corporation. It alleged in essence that the plaintiff had been deprived of her preemptive rights by what occurred in October, 1949. The plaintiff made a motion under Section 61b of the New York Stock Corporation Law. That motion was denied by Mr. Justice Liebell of that Court. Mr. Justice Leibell's opinion rendered on March 2, 1951 stated at page 8 thereof:

> "The corporation's attorneys argue that the corporation cannot remain neutral in this suit and that therefore it is entitled to security; that it cannot remain neutral because 'the option was authorized by the directors and stockholders and it is the judgment of the directors that it is to the best interest of the corporation that the sale be consummated.' The option

referred to as having been authorized by the stockholders (in February, 1945) is not under attack. It is the sale or new option of October, 1949 that is under attack because it was not authorized by the stockholders although the charter expressly required their authorization. The February, 1945 consent of the stockholders to what amounted to a waiver of their preemptive rights was based upon certain conditions, namely, the terms of the purchase. Whether they would consent to a waiver of their preemptive rights under the terms of the October 1949 resolution seems to me to be a matter upon which they were entitled to exercise their judgment at a stockholders' meeting.

"The fact that the board of directors is of the opinion that the sale or new option is advantageous to the corporation in keeping Voit in its employ does not change the fundamental nature of the plaintiff's action. While it might be beneficial to the corporation it may at the same time be detrimental to the rights of the individual stockholder in relation to his stock position."

It is clear that under the aforementioned decision, the basis of Judge Leibell's opinion is that the October, 1949, transaction constituted a new sale or a new option and required the assent of 2/3 of the stockholders in interest before it could become valid and binding. Unless some new evidence is furnished by the defendants to disprove the essential allegations of the complaint this motion for summary judgment should be granted.

For the purposes of the record, I am setting forth the gist of the New Jersey Statutes which may have a bearing upon this action.

The New Jersey Statutes Annotated

14:8.17

"Upon the issue of capital stock for cash unless otherwise expressly provided in the certificate of incorporation or in by-laws adopted by 2/3 in interest of each class of stockholders every stockholder shall

have a right unless waived by him, to purchase his pro rata proportion of the stock to be issued according to the number of shares held by him at such price which may be in excess of par value within such time and on such terms as shall be fixed and determined by the Board of Directors."

14:11.1 provides

> "Any corporation organized under this title • • • may in the manner provided by Section 14:11.2 of this title • • • change the number of its outstanding shares of any class of stock into a different number of shares of such class • • •."

14:11.2

> "The Board of Directors shall pass a resolution declaring that such amendment, change or alteration is advisable and calling a meeting of the stockholders to take action thereon. The meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice given personally or by mail.
>
> "If two thirds in interest of each class of stockholders having voting powers shall vote in favor of such amendment, change or alteration the corporation shall make a certificate thereof under its seal • • •"

14:8.9

> "Only cash or its equivalent and property including stock of another corporation and labor • • • shall be considered as payment of any part of the capital stock of any corporation organized under this title."

In substance these acts provide that under New Jersey Law; each stockholder has a preemptive right to purchase their pro rata proportion of newly issued stock; that before any stock can be newly isued 2/3 of the stockholders in interest must assent to it; and that the newly issued stock must be paid for in cash or something of value such as services or property.

Affidavit of Sidney L. Garwin

In the instant case the plaintiff's preemptive rights were violated; the assent of 2/3 of the stockholders in interest, to the 1949 transaction, was never obtained and the purported purchase price was a piece of paper which had no other effect than to change the ownership of the stock from Mengel to Voit without any consideration flowing to Mengel. All they had was a right against the very stock that had been sold. Therefore, all three sections of the New Jersey Statutes were violated.

The stock is, at the present time, under the control of and in the possession of Mengel and the dividends applicable to said stock have not yet left the physical possession of the company.

It is, therefore, apparent that an injunction will effectually remedy the situation. It is clear that the complaint and this cause of action does not attack or seek to impugn the original option granted on February 27, 1945. It only seeks to attack the purported exercise of that option only in a manner which in essence constituted the granting of a new option.

It is respectfully submitted that the motion for summary judgment should be granted.

Sidney L. Garwin

Sworn to before me this 3rd
day of October, 1951.

L. Lyne Smith states that he is one of the attorneys for the plaintiff, Ann Ames, and that this Motion for Summary Judgment is to seek a rescission of the transactions complained of in the Complaint, and for an accounting of the assets of Mengel Company, including stock dividends paid and that a decree be entered directing the defendants to repay to Mengel Company the amount of loss sustained by Mengel Company or the amount of profit earned by the defendant, Voit, whichever shall be greater; and for such further relief as may be just and proper; any injunctive relief requested is purely ancillary to effect the above relief requested.

L. Lyne Smith

Affidavit of Sidney L. Garwin

Subscribed and sworn to before me by L. Lyne Smith, this 7 day of January, 1952.

My commission expires

_____

Notary Public,
Jefferson County, Kentucky

EXHIBIT A.

EXTRACT FROM PROXY STATEMENT OF THE MENGEL COMPANY

Special Meeting of Stockholders February 27, 1945
At pages 9 & 10

II

THE OPTION TO THE PRESIDENT

The Board of Directors at a regular meeting held May 19, 1944, passed resolutions, copies of which are enclosed, declaring that in their opinion it is advisable that an option be granted, and provisionally granting an option, by the Company to Alvin A. Voit, its president, to purchase 10,000 shares of the unissued $1.00 par value common stock of the Company, or any part thereof, at any time, and from time to time, on or prior to December 31, 1949, at the price of $10.00 per share, which was the approximate market price of the common stock of the Company at the date of said meeting. The market price of this stock was $15.00 per share at the close of business on January 20, 1945. Mr. Voit currently owns 2,001 shares of the Common Stock out of a total of 417,681 shares issued and outstanding.

The resolutions state that the Board of Directors is desirous of having Mr. Voit more substantially interested in the Company as a holder of its common stock. The

Exhibit "A"

Company in 1937 had set aside 50,000 shares of its common stock for purchase by officers and certain other employees at a net cost to them of $10.00 per share, under the terms of a Stock Purchase Plan which expired June 30, 1942, without the purchase by any individuals of such shares and accordingly such shares have been released from reservation therefor. It is now proposed to permit Mr. Voit to purchase not exceeding 10,000 shares of the unissued common stock on the terms aforesaid. *No part of the option may be exercised unless Mr. Voit is still in the employ of the Company.* There are no restrictions against the sale of the shares purchased or the assignment of the option under the option agreement. The resolutions state that the option is granted to give the President an additional incentive to continue his splendid efforts in behalf of the Company, and to continue him in that capacity, in the best interests of the Company. The Company's Charter authorizes it to issue a total of 1,040,000 Common Shares of the par value of $1 each, of which 417,681 shares are now outstanding. If two-thirds in interest of the Common Stockholders present at the meeting and voting shall vote in favor of such option it will become operative and binding upon all stockholders, and no stockholder will have any preemptive rights to buy any of said 10,000 shares covered by said option. If said option is approved and exercised, the Corporation will still have 612,319 shares of authorized but unissued Common Stock. The financial statements of the Company are not included in this statement for the reason that the Company's auditors and accountants have not yet completed their figures for the year 1944, and the Stockholders have all received copies of the 1943 statement. Since the option is at the same price heretofore given to officers and employees, which was not exercised, as above stated, it is believed that financial statements are not material for the exercise of prudent judgment as to the proposal. Financial statements of the Company are on file with the Securities and Exchange Commission and with the New York Stock Exchange.

The resolutions granting the option must be approved by two-thirds in interest of the common stockholders

present at the special meeting; thereafter, to be valid the option must be approved by the necessary governmental authorities. Mr. Voit's total compensation from the Company is, as above stated, $35,000 per annum.

The special meeting of the common stockholders called to be held February 27, 1945, is the first meeting of stockholders to be held since the directors passed their resolution. The letter from the Chairman of the Board of Directors which accompanies the notice of the meeting states briefly the reasons for granting the option to the President, and that it was not deemed necessary to call a special meeting of stockholders for the sole purpose of ratifying and approving the action of the directors in granting said option.

It is the intention of the management to vote proxies in favor of approving the option unless the stockholders vote "Against" in the space designated for that purpose.

All expenses in connection with this solicitation of proxies will be borne by the Company. It is anticipated that the solicitation of proxies for use at said meeting will be made primarily by mail. In addition, the Company intends to request brokers who hold stock in their names to solicit proxies from their customers who own such stock, pursuant to the rules of the New York Stock Exchange. The Company will reimburse such brokers for their out-of-pocket expenses and reasonable clerical expenses, the anticipated amount thereof estimated to be $250.

The management does not intend to present any business other than the proposals to adopt the Mengel Savings and Retirement Plan and to ratify and approve the option to the president to purchase stock as set forth in the notice of meeting and has no information that other matters will be brought before the meeting. However, as to any other matters that may be brought before the meeting, it is the intention that the proxies shall be voted in accordance with the judgment of the persons named in the proxies on such matters. Dated, January 22, 1945.

EXHIBIT B.

RESOLUTION OF BOARD OF DIRECTORS OF THE MENGEL COMPANY

Adopted at a Regular Meeting Held Friday, May 19, 1944

The following resolution was duly made, seconded and unanimously passed (Mr. Voit not voting):

Whereas the Board of Directors is desirous of having Mr. Alvin A. Voit, President of the Company, more substantially interested in the Company as a holder of the Company's Common Stock; and

Whereas the Stock Purchase Plan of The Mengel Company under which 50,000 shares of the Common Stock of the Company were set aside for purchase by officers, managers and key men of the Company at a net cost to them of $10.00 per share expired on June 30, 1942, without the purchase by any individuals of such shares and accordingly such shares have been released from reservation therefor;

Be It Resolved that it is in the opinion of the Board of Directors advisable that an option be and it hereby is granted by the Company to Alvin A. Voit, its President, to purchase Ten Thousand (10,000) shares of the unissued $1.00 par value Common Stock of The Mengel Company, or any part thereof, at any time and from time to time on or prior to December 31, 1949, at the price of $10.00 per share, same being the approximate market price of the Common Stock of the Company at the date of this meeting.

Provided, however, that no part of this option may be exercised unless Mr. Voit is still in the employ of the Company; and until it is approved by the stockholders and the proper governmental authorities.

Be It Further Resolved that this option is not granted or regarded by the Board of Directors as a remuneration for services but is granted in order that Mr. Voit may have an additional incentive to continue his splendid efforts in behalf of the Company as its President and to continue him in that capacity in the best interests of the Company.

Exhibit "B"

This resolution shall be submitted to the stockholders of the Company for adoption at the next meeting to be called.

EXHIBIT C.

EXTRACT FROM DEPARTMENT OF STOCK LIST
NEW YORK STOCK EXCHANGE
Receiving No. A-11973
AUTHORITY FOR AND PURPOSE OF ISSUE

As to the 10,000 shares of Common Stock to be issued upon exercise of the option granted to Alvin A. Voit;

At a meeting of the Board of Directors of the Company held on May 19, 1944, the Board adopted a resolution whereby an option was granted by the company to Alvin A. Voit, its President, to purchase 10,000 shares of the unissued Common Stock of the Company or any part thereof, at any time and from time to time on or before December 31, 1949, at the price of $10 per share, same being the approximate market price of the Common Stock of the Company at the date of said meeting. The resolution expressly provides that no part of the option may be exercised unless Mr. Voit is still in the employ of the Company and until it has been approved by the necessary governmental authorities.

Said resolution further stated that the option was not granted or regarded by the Board of Directors as remuneration for services, but was granted in order that Mr. Voit might have an additional incentive to continue his splendid efforts in behalf of the Company as its President, and to continue him in that capacity in the best interests of the Company. At a meeting of the stockholders of the Company held February 27, 1945, the action

taken by the Board of Directors with respect to said option was approved.

The entire amount of cash to be received at the rate of $10 per share upon exercise of said option will be added to the general funds of the Company, and used for any corporate purpose for which such funds may be devoted.

The cash so received at the rate of $1 per share of Common Stock issued upon exercise of said option will be credited to capital, and the balance at the rate of $9 per share will be credited to capital surplus, account of the Company.

EXHIBIT D.

NOTE OF ALVIN A. VOIT TO
THE MENGEL COMPANY

Louisville Kentucky, October 26, 1949

On demand I promise to pay to the order of The Mengel Company, the sum of One Hundred Thousand dollars ($100,000.00) with interest at the rate of three per cent (3%) per annum from date payable semi-annually, until paid.

The note is secured by pledging with The Mengel Company Ten Thousand (10,000) shares of the Common Stock of the Company, accompanied by stock powers attached hereto and signed in blank by me. I shall have the privilege of withdrawing collateral from time to time by payments on the principal of the note at the rate of ten Dollars ($10.00) cash for each share of the collateral withdrawn.

Dividends declared and paid on shares held as security for this note are to be applied first towards the payment of interest, and second towards the payment of the principal of this note.

The Company shall look solely to the collateral pledged for the payment of this note.

(signed) Alvin A. Voit

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky

Civil Action No. 2228

Ann F. Ames, - - - - - - - - - Plaintiff,

v.

Alvin A. Voit,
Albert L. Entwistle,
Walter T. Green,
Dulaney Logan,
The Mengel Company,
Charles G. Middleton, and
Edward Lane, - - - - - - - - Defendants.

ANSWER—Filed Jan. 18, 1952.

The defendants, Alvin A. Voit, Albert L. Entwistle, Warren T. Green (erroneously called Walter T. Green in the Complaint), Dulaney Logan, The Mengel Company, Charles G. Middleton and Edward Lane, for answer to the Complaint herein, state as follows:

FIRST DEFENSE.

1. The Complaint fails to state a claim against the defendants, or any of them, upon which relief can be granted.

SECOND DEFENSE.

2. Plaintiff's alleged claim is compensable in damages and the Complaint fails to state facts justifying the granting of an injunction.

THIRD DEFENSE.

3. The matter in controversy, exclusive of interest and costs, does not exceed the sum or value of Three Thousand ($3,000) Dollars.

FOURTH DEFENSE.

4. The defendants admit that the plaintiff is a citizen of New York and that the individual defendants are citizens of the States of Kentucky and Virginia and Mengel Co. is organized under the laws of New Jersey. The other affirmative allegations of Paragraph 1 of the Complaint are denied.

FIFTH DEFENSE.

5. The defendants admit the allegations of Paragraph 2 of the Complaint and state that the records of the Mengel Co. show the plaintiff is and has been since July 31, 1947, the owner of only 50 shares of the capital stock of the Mengel Co.

SIXTH DEFENSE.

6. The defendants admit the allegations of Paragraphs 3, 4, 5, 6 and 7 of the Complaint.

SEVENTH DEFENSE.

7. The defendants deny the allegations of Paragraph 8 of the Complaint.

EIGHTH COMPLAINT.

8. The defendants admit the allegations of Paragraph 9 of the Complaint.

NINTH DEFENSE.

9. The defendants admit the allegations of Paragraph 10 of the Complaint except that they deny that on November 19, 1950, or at any time, the corporation declared that the regular quarterly dividend rate would be 50 cents per share, or that such alleged regular dividend rate has been maintained; and the defendants do not have sufficient knowledge or information to form a belief whether the

dividends will be sufficient completely to pay for the 10,000 shares of stock.

TENTH DEFENSE.

10. The defendants admit the allegations of Paragraph 11 of the Complaint.

ELEVENTH DEFENSE.

11. The defendants deny the allegations of Paragraph 12 of the Complaint.

TWELFTH DEFENSE.

12. The defendants admit the allegations of Paragraph 13 of the Complaint and state that the stock has recently sold at approximately $14.00 a share on the New York Stock Exchange, $14.75 on January 15, 1952, and as low as $9.63 on October 21, 1949, the day on which the defendant Voit exercised the option.

THIRTEENTH DEFENSE.

13. The defendants deny the allegations of Paragraphs 14 and 15 of the Complaint.

FOURTEENTH DEFENSE.

14. The defendants deny the allegations of Paragraph 16 of the Complaint and state that the Directors of the Mengel Company, the length of time served by them and the office held by each, if any, is as follows, to-wit:

Name of Director	First Became Director
Herbert F. Boynton	1949
Albert L. Entwistle, Vice President of Company—resigned Dec. 31, 1951	1948
Laurance B. Olmsted	1951
Edward H. Lane	1949
Dulaney Logan, Vice President of Company.	1921
Chas. G. Middleton	1946
Alvin A. Voit, President of Company	1931

Answer

FIFTEENTH DEFENSE.

15. The defendants deny the allegations of Paragraph 17 of the Complaint.

SIXTEENTH DEFENSE.

16. The defendants deny the allegations of Paragraph 18 of the Complaint except that they admit the plaintiff has not requested the corporation or its Board of Directors to bring action against the individual defendants.

SEVENTEENTH DEFENSE.

17. The defendants deny the allegations of Paragraph 19 of the Complaint except that they admit the plaintiff has made no demand on the stockholders of the corporation to bring this action.

EIGHTEENTH DEFENSE.

18. Defendants state that on January 22, 1945, the Chairman of the Board of Mengel, William B. Harrison, addressed a letter to all stockholders, in which the Board asked and recommended approval of an option to Alvin A. Voit covering 10,000 shares of the Common Stock of Mengel at the coming special stockholders meeting to be held on February 27, 1945; that the Board of Directors of Mengel had passed a resolution granting the option to Alvin A. Voit on May 19, 1944; that notice of the special meeting of stockholders to be held on February 27, 1945, notified the stockholders, among other things, that they were to take action on the option granted to Alvin A. Voit. A full description of the option was contained in the proxy statement to the stockholders, and a full copy of the resolution of the Board of Directors was also sent to the stockholders. Thereafter, at the special meeting of stockholders held as scheduled on February 27, 1945, the resolution of the Board of Directors granting Alvin A. Voit the option to purchase 10,000 shares of the Common Stock of the Company at any time and from time to time on or prior to December 31, 1949, at the price of $10.00 per share, and the resolutions of the Board of Directors with respect thereto were ratified

and approved by the stockholders by a vote of 229,142 shares cast for the adoption of the resolution, and 36,385 shares voted against the resolution.

Reference is made to the letter of William B. Harrison, Chairman of the Board, dated January 22, 1945, and to the notice of the special meeting and the proxy statement sent to the stockholders for the special meeting to be held on February 27, 1945, and to the resolution of the stockholders adopted at the special meeting, approving the option as hereinabove set forth, copies being attached hereto as part hereof, for the true and exact contents thereof.

Defendants state that on October 26, 1949, Alvin A. Voit exercised said option by delivering to Mengel a demand promissory note dated October 26, 1949, for the $100,000 executed by Alvin A. Voit, and bearing interest at the rate of three per cent per annum from date, payable semi-annually; that certificates for 10,000 shares of stock were issued in the name of Alvin A. Voit and delivered to him, and thereupon by him redelivered to Mengel, with powers of attorney for transfer duly executed by him, as security for the payment of said promissory note, it being provided in said note that the defendants might from time to time withdraw the collateral by making payments on the principal at the rate of $10.00 for each share withdrawn; that dividends on the shares held as security were to be applied first toward the payment of interest, and second toward the payment of principal; that Mengel should look solely to the 10,000 shares of stock pledged as collateral for the payment of said note. Defendants state that the manner of exercising said option was in accord with the resolution of the Board of Directors theretofore adopted by it and approved by the stockholders; that neither the resolution nor the approval by the stockholders provided that Alvin A. Voit should be required to pay cash for said stock at the time he exercised the option, but that cash was required only when Mengel finally released the stock to Alvin A. Voit.

Defendants state that on October 21, 1949, the Board of Directors of Mengel passed a resolution approving the

method by which Alvin A. Voit exercised the option theretofore granted to him, and further state that on or about April 4, 1950, Mengel duly mailed to each of its stockholders of record on said date notice of the annual meeting of stockholders to be held on May 3, 1950, for the election of directors, the approval of the appointment of public accountants, and to consider and act upon such other business as might properly come before the meeting. Accompanying said notice was a proxy statement dated April 4, 1950, a copy being attached hereto, which provided in part as follows, giving to the stockholders exact information as to how Alvin A. Voit had exercised the option granted to him by the Board of Directors with the approval of stockholders:

> "(5) By action of the Board of Directors, approved by the stockholders of the Company, on February 27, 1945, Mr. Voit was granted an option to purchase 10,000 shares of Common Stock of the Company at $10.00 per share. Mr. Voit exercised this option on October 26, 1949. On the date this option was exercised the highest price at which Common Stock of the Company was sold on the New York Stock Exchange was $10.25 per share. The purchase price of $100,000 for this stock is evidenced by a demand promissory note dated October 26, 1949, executed by Mr. Voit, bearing interest at the rate of 3% per annum from date, payable semi-annually. Certificates for these 10,000 shares of Common Stock have been issued in the name of Alvin A. Voit, but are held by the Company as security for the payment of the promissory note, above mentioned, it being provided in said promissory note that the Company shall look solely to the 10,000 shares of stock pledged as collateral for the payment of this note. The largest aggregate amount of indebtedness outstanding from Mr. Voit to the Company at any time during 1949 was $100,000, being the promissory note above mentioned. As of March 15, 1950, the aforesaid promissory note was outstanding."

Said annual meeting was duly held, pursuant to said notice, on May 3, 1950, and at said meeting there was no legal objection to the resolution of the Board of Directors of October 21, 1949, authorizing the issuance of said 10,000 shares of stock to Alvin A. Voit as described in the complaint, or to the manner of the exercise of the defendant Voit of the option granted to him. At said meeting of stockholders approximately 75 per cent of the stock of Mengel was represented and voted favorably for the Management and re-election of the Board of Directors offered to the meeting by the Management.

The plaintiff herein, although having received due notice of the meeting of stockholders, together with a proxy statement containing full information in regard to the option did not attend said annual meeting nor did she send in a proxy for anyone to represent her, nor did anyone representing her attend said meeting, or make any motion or any legal objection to the exercise of said option.

Accordingly defendants state that the plaintiff herein and all stockholders whom she may represent or claim to represent accuiesced in, ratified and confirmed said resolution of the Board of Directors on October 21, 1949, and the exercise by Alvin A. Voit of said option on October 26, 1949, and the manner thereof, and are now estopped to assert that said resolution of said exercise of the option was illegal or improper.

Defendants state that at the 1951 annual meeting, held on May 2, 1951, eighty per cent of the stock of the Company was represented at the meeting, being the largest percentage of representation ever had at any annual meeting of Mengel. Defendants state that, although the attention of the stockholders had again been called to the Voit option and the method of its exercise in the proxy statement sent to all the stockholders of Mengel, there was no objection raised at the stockholders meeting, and again the stockholders voted unanimously in favor of the Management and for the reelection of the entire Board of Directors offered to the meeting by the Management.

Answer

NINETEENTH DEFENSE.

19. Defendants state that Mengel is a New Jersey corporation, having its principal place of business at Louisville, Kentucky, and state that the matters alleged in the complaint relate to the internal government and affairs of a New Jersey corporation and are to be determined by the laws of New Jersey, under which the internal affairs of a corporation, in the absence of fraud, are left entirely to the officers and directors of the corporation.

Wherefore, the defendants pray to be hence dismissed, for its costs herein expended and all proper relief.

(Chas. G. Middleton)

(Louis Seelbach)

(Leo T. Wolford)

(Edwin G. Middleton)

501 South Second Street
Louisville 2, Kentucky

Attorneys for the Defendants

RESOLVED

That an option be granted to Mr. Alvin A. Voit, President of the Company, to purchase 10,000 shares of the unissued $1.00 par value Common Stock of The Mengel Company, or any part thereof, at any time, and from time to time, on or prior to December 31, 1949, at the price of $10.00 per share, and that the resolutions of the Board of Directors with respect thereto adopted at the regular meeting held May 19, 1944, be ratified and approved; provided, however, that no part of this option may be exercised unless

Mr. Voit is still in the employ of the Company, and until it is approved by the proper governmental authorities.

THE MENGEL COMPANY
NOTICE OF ANNUAL MEETING
OF STOCKHOLDERS

(Filed with Defendant's Answer (Ames case) —January 18, 1952

To The Holders Of The Common Stock
Of The Mengel Company:

Please Take Notice that the Annual Meeting of Stockholders of The Mengel Company will be held on Wednesday, May 3, 1950, at 2:00 o'clock P.M., at the office of the Company, Fourth and Colorado Streets, Louisville, Kentucky, for the following purposes:

(1) To elect a board of seven directors to serve for the ensuing year;

(2) To ratify and approve the appointment of independent public accountants;

(3) To consider and act upon such other business as may properly come before the meeting.

Only holders of Common Stock of record at the close of business on April 4, 1950 will be entitled to notice of and to vote at this meeting.

You are earnestly requested, if you cannot attend the meeting in person, to execute and return the enclosed proxy, to the end that there may be a full expression by the stockholders of their desires in the matters to be presented to them at this meeting. The proxy is revocable by you at any time before it is voted, and the giving of a proxy will not affect your right to vote in person, if you later decide to attend the meeting.

By order of the Board of Directors,

Louisville, Kentucky
April 4, 1950

C. O. Meloy,
Secretary.

EXTRACT FROM PROXY STATEMENT OF APRIL 4, 1950

(Filed with Defendant's Answer (Ames case)
January 18, 1952)

(5) By action of the Board of Directors, approved by the stockholders of the Company on February 27, 1945, Mr. Voit was granted an option to purchase 10,000 shares of Common Stock of the company at $10.00 per share. Mr. Voit exercised this option on October 26, 1949. On the date this option was exercised the highest price at which Common Stock of the Company was sold on the New York Stock Exchange was $10.25 per share. The purchase price of $100,000 for this stock is evidenced by a demand promissory note dated October 26, 1949, executed by Mr. Voit, bearing interest at the rate of 3% per annum from date, payable semiannually. Certificates for the 10,000 shares of Common Stock have been issued in the name of Alvin A. Voit, but are held by the Company as security for the payment of the promissory note, above mentioned, it being provided in said promissory note that the Company shall look solely to the 10,000 shares of stock pledged as collateral for the payment of this note. The largest aggregate amount of indebtedness outstanding from Mr. Voit to the Company at any time during 1949 was $100,000 being the promissory note above mentioned. As of March 15, 1950, the aforesaid promissory note was outstanding.

In the
UNITED STATES DISTRICT COURT
For the Western District of Kentucky
Civil No. 2107

Arthur Haffer and
Hilda D. Haffer, - - - - - - - Plaintiffs,

v.

Alvin A. Voit and
The Mengel Company, - - - - - Defendants.

SECOND AMENDED COMPLAINT—
Filed March 12, 1952.

Plaintiffs, suing on their own behalf and on behalf of all other stockholders of The Mengel Company similarly situated, and in the right of The Mengel Company, complaining of the defendants, for their second amended complaint, allege, upon information and belief, except as to Paragraphs "1" and "2", which plaintiffs allege on knowledge:

1. Plaintiff, Arthur Haffer, now and at all times since on or about May 2, 1946 is and has been the owner and holder of shares of the common stock of The Mengel Company (hereinafter called "Mengel"). Plaintiff, Hilda D. Haffer, now and at all times since on or about December 23, 1948 is and has been the owner and holder of shares of the common stock of Mengel.

2. Plaintiffs are citizens of the Commonwealth of Massachusetts.

3. The defendant, Alvin A. Voit, is a citizen of the State of Kentucky.

4. Mengel is a New Jersey Corporation, and is doing business in this District.

5. Jurisdiction of this action is based upon the diversity of citizenship of the parties hereto.

6. This action is not a collusive one brought to confer jurisdiction on this court of an action of which it would not otherwise have jurisdiction.

7. The matter in controversy in this action exceeds the sum of $3,000.00, exclusive of interest and costs.

8. The charter of Mengel requires that two-thirds of the stockholders, at a meeting called for that purpose, consent to any authorization for the issuance of additional stock.

9. (a) By a notice dated January 22, 1945, Mengel called a special meeting of its stockholders to be held on February 27, 1945, for the purpose of acting on a previously adopted resolution of the Board of Directors granting the defendant, Alvin A. Voit, an option to purchase 10,000 shares of the unissued common stock of Mengel prior to January 1, 1950, at a price of $10.00 per share. It was contemplated that such option be exercised by cash payments upon the exercise thereof.

(b) At said special meeting of the stockholders of Mengel, held on or about February 27, 1945, by affirmative vote of more than two-thirds of the stockholders present said resolution of the Board of Directors granting the aforesaid option to the defendant, Alvin A. Voit was approved.

10. On or about October 21, 1949, the directors of Mengel adopted a resolution providing for the sale to the defendant, Alvin A. Voit, of 10,000 shares of the theretofore unissued stock of Mengel for the purchase price of $100,000., payment of which was permitted to be made by the defendant, Alvin A. Voit, delivering to the corporation his promissory note for $100,000., bearing interest at a rate of 3% payable semi-annually with a specific provision that the corporation is to have no recourse against the maker of the note except to the extent of the stock de-

posited as collateral security therefor, and that the corporation should look solely to the collateral (viz:—the said 10,000 shares of theretofore unissued stock of Mengel) pledged for the payment of said note, and further providing that dividends on the said shares so held as security were to be applied towards the payment of the interest and principal of said note.

11. On or about October 26, 1949, the defendant, Alvin A. Voit, attempted to purchase the said theretofore unissued 10,000 shares of the common stock of Mengel by delivering to Mengel his promissory note in the sum of $100,000., payable on demand, bearing interest at the rate of 3% per annum semi-annually, providing that it be secured with the said 10,000 shares of theretofore unissued common stock of Mengel, further providing the right to defendant, Alvin A. Voit, to take possession of such quantities of shares which were held as collateral as he might from time to time desire to take, by making payments on the principal of said note at the rate of $10.00 in cash for each such share he might take.

12. Such purported purchase by the defendant, Alvin A. Voit, of said 10,000 shares of theretofore unissued common stock of Mengel was invalid and without effect because it had not been approved or consented to by two-thirds of the stockholders of Mengel.

13. Such purported sale of 10,000 shares of theretofore unissued common stock of Mengel to the defendant, Alvin A. Voit, was not an exercise of the option granted and approved by the stockholders of Mengel at the meeting held on or about January 22, 1945, for the reason that the terms of said sale differed from the terms of said option.

14. Such purported sale of 10,000 shares of the theretofore unissued common stock of Mengel to the defendant, Alvin A. Voit, was not an exercise of the option granted and approved by the stockholders of Mengel at the meeting held on or about January 22, 1945, for the reason that the terms of said sale failed to provide for any real payment for said stock by defendant, Alvin A. Voit, and provided

no binding obligation for the defendant, Alvin A. Voit, at any time to make payment therefor.

15. Such purported sale of 10,000 shares of the theretofore unissued common stock of Mengel to the defendant, Alvin A. Voit, was not an exercise of the option granted and approved by the stockholders of Mengel at the meeting held on or about January 22, 1945, for the reason that the terms of the option were that it could be properly exercised only by payment for said stock in cash prior to January 1, 1950.

16. Such purported sale of 10,000 shares of the theretofore unissued common stock of Mengel to the defendant, Alvin A. Voit, was not an exercise of the option granted and approved by the stockholders of Mengel at the meeting held on or about January 22, 1945, for the reason that at no time prior to the said sale on or about October 26, 1949, did two-thirds of the stockholders of Mengel in any way authorize such sale or the terms thereof.

17. (a) The aforesaid 10,000 shares of the theretofore unissued common stock of Mengel have been issued by Mengel but are at the present time in the possession of Mengel which holds them as collateral security under the terms of the aforesaid sale.

(b) Since said sale the common stock of Mengel has sold on the New York Stock Exchange at a price as high as $21.50 per share.

(c) The annual dividend rate on the common stock of Mengel has been declared by the Board of Directors of Mengel to be $2.00 per share per annum.

18. The effect of the terms of the said sale are to permit the defendant, Alvin A. Voit, to acquire 10,000 shares of the common stock of Mengel by the accumulation of the dividends thereon, without any expenditure therefor on his part, without any risk to him, and in effect, constitutes an unauthorized gift of corporate assets to him, all of which is a waste of the assets of Mengel.

19. Unless enjoined by this Court, Mengel intends to transfer to the defendant, Alvin A. Voit, the said 10,000

shares of its theretofore unissued common stock in accordance with the terms of the said sale, and in the event such intention is put into effect, Mengel will be irreparably damaged.

20. Demand on the directors of Mengel to bring this action would be futile because the directors of Mengel are dominated and controlled by the defendant, Alvin A. Voit, and the present directors have participated in the wrongs complained of, or with knowledge thereof, have failed and refused to take action thereon, and any such demand would in effect be a demand that they sue themselves. Should they acquiesce in such demand, prosecution of the suit would be in friendly hands, the Board of Directors has it within its power to take action to accomplish the purposes of this suit without the necessity for legal action.

21. Demand on the stockholders of Mengel to bring this action is unnecessary because under the laws of Kentucky, and the Charter and by-laws of Mengel, its officers and directors manage its affairs, and the stockholders can not, by action within the corporation, compel the directors to commence suit.

22. Demand on the stockholders of Mengel to commence this action would be futile because there are more than 500,000 shares outstanding which are actively traded in on the New York Stock Exchange, which shares are held by thousands of stockholders widely scattered throughout the United States and elsewhere, whose identity is subject to continuous change, and it is, therefore, impracticable to make such demand upon them. To effectively present the question involved herein to the stockholders of the corporation, so as by this means to have the stockholders require the corporation to take action herein, would involve the waging of a proxy fight, which would entail enormous labor and expense to the plaintiffs, and it is, therefore, impracticable.

23. Plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs demand judgment:

1. Enjoining and prohibiting the corporation from giving effect to the sale referred to herein, and from transferring said 10,000 shares of stock, or any part thereof, or

any dividends becoming due thereon, to the defendant, Alvin A. Voit, or to anyone on his behalf.

2. Enjoining and prohibiting the defendant, Alvin A. Voit, from receiving or exercising any rights, in relation to the aforesaid 10,000 shares of common stock of Mengel.

3. Requiring defendant, Alvin A. Voit, to account to Mengel for all of Mengel's losses and damages sustained as a result of the matters alleged herein, and for all of his profits.

4. Declaring the rights of the parties hereto, and granting such other relief as the Court may deem just.

Israel Beckhardt
Attorney for Plaintiffs
Office & P.O. Address
18 East 41st Street
Borough of Manhattan
City of New York.

Commonwealth of Massachusetts }
County of Suffolk } ss:

Arthur Haffer and Hilda D. Haffer, being duly sworn, deposes and say:

That they are the plaintiffs herein; that they have read the foregoing complaint and know the contents thereof, and that the same is true to their own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, they believe it to be true.

Hilda D. Haffer
Arthur Haffer

Sworn to before me this
27 day of February, 1952.

Jack J. Moss
Notary Public
(certificate)

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky

Civil Action No. 2107

Arthur Haffer and
Hilda D. Haffer, suing on behalf of themselves and all other stockholders of The Mengel Company, similarly situated, - - Plaintiffs,

v.

Alvin A. Voit and
The Mengel Company, - - - - Defendants.

ANSWER TO THE PLAINTIFFS' SECOND AMENDED COMPLAINT.

FIRST DEFENSE.

1. The complaint fails to state a claim against the defendant, The Mengel Company, hereinafter called "Mengel", or against the defendant, Alvin A. Voit, upon which relief can be granted.

SECOND DEFENSE.

2. Plaintiffs' alleged claim is compensable in damages and the Second Amended Complaint fails to state facts justifying the granting of an injunction.

THIRD DEFENSE.

3. The matter in controversy, exclusive of interest and costs, does not exceed the sum or value of $3,000.00.

FOURTH DEFENSE .

4. Defendants admit the allegations of Paragraph 1 of the Second Amended Complaint, and state that as of this

date the records of Mengel show that the plaintiff, Arthur Haffer, is the owner of 32 shares and the plaintiff, Hilda D. Haffer, is the owner of 43 shares.

FIFTH DEFENSE.

5. Admit the allegations of Paragraphs 2, 3, 4 and 5 of the Second Amended Complaint.

SIXTH DEFENSE.

6. Deny the allegations of Paragraph 6 of the Second Amended Complaint, because it contains a conclusion of law.

SEVENTH DEFENSE.

7. Deny the allegations of Paragraph 7 of the Second Amended Complaint.

EIGHTH DEFENSE.

8. Deny the allegations of Paragraph 8 of the Second Amended Complaint.

NINTH DEFENSE.

9. Admit the allegations of Paragraph 9(a), except they deny that it was contemplated that the option would be exercised by cash payments upon the exercise thereof.

TENTH DEFENSE.

10. Admit the allegations of Paragraph 9(b) of the Second Amended Complaint.

ELEVENTH DEFENSE.

11. Admit the allegations of Paragraph 10 of the Second Amended Complaint.

TWELFTH DEFENSE.

12. Admit the allegations of Paragraph 11 of the Second Amended Complaint with the correction that the defendant Voit actually purchased instead of, as alleged, attempted to purchase the 10,000 shares of the common stock of Mengel.

Answer to Plaintiffs' Second Amended Complaint

THIRTEENTH DEFENSE.

13. Deny the allegations of Paragraph 12 of the Second Amended Complaint.

FOURTEENTH DEFENSE.

14. Deny the allegations of Paragraph 13 of the Second Amended Complaint.

FIFTEENTH DEFENSE.

15. Deny the allegations of Paragraph 14 of the Second Amended Complaint.

SIXTEENTH DEFENSE.

16. Deny the allegations of Paragraph 15 of the Second Amended Complaint.

SEVENTEENTH DEFENSE.

17. Deny the allegations of Paragraph 16 of the Second Amended Complaint.

EIGHTEENTH DEFENSE.

18. Admit the allegations of Paragraphs 17(a) and 17(b) of the Second Amended Complaint and state that the stock has recently sold at approximately $14.00 a share on the New York Stock Exchange, and as low as $9.63 on October 21, 1949, the day on which the defendant Voit exercised the option. Defendants deny the allegations of Paragraph 17(c).

NINETEENTH DEFENSE.

19. Deny the allegations of Paragraph 18 of the Second Amended Complaint.

TWENTIETH DEFENSE.

20. Admit the allegations of Paragraph 19 of the Second Amended Complaint, except that it denies that Mengel will be irreparably damaged or damaged at all.

Answer to Plaintiffs' Second Amended Complaint

TWENTY-FIRST DEFENSE.

21. Deny the allegations contained in Paragraph 20 of the Second Amended Complaint.

TWENTY-SECOND DEFENSE.

22. Deny the allegations of Paragraph 21 of the Second Amended Complaint.

TWENTY-THIRD DEFENSE.

23. Deny the allegations of Paragraph 22 of the Second Amended Complaint.

TWENTY-FOURTH DEFENSE.

24. Deny the allegations of Paragraph 23 of the Second Amended Complaint.

TWENTY-FIFTH DEFENSE.

25. Defendants reiterate and adopt by reference all of the allegations in Paragraph 24 of the original answer.

TWENTY-SIXTH DEFENSE.

26. Defendants reiterate and adopt by reference all of the allegations of Paragraph 25 of the original answer.

Wherefore, the defendants, Alvin A. Voit and The Mengel Company, pray to be hence dismissed, for their costs herein expended, and all proper relief.

Chas. G. Middleton

Louis Seelbach

Leo T. Wolford

Edwin G. Middleton
501 South Second Street
Louisville 2, Kentucky
Attorneys for the Defendants

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky

Civil Action No. 2228

Ann F. Ames, - - - - - - - Plaintiff,

v.

Alvin A. Voit, et al., - - - - - Defendants,

Civil Action No. 2107

Arthur Haffer and
Hilda D. Haffer, - - - - - - - Plaintiffs,

v.

Alvin A. Voit, et al., - - - - - Defendants.

AGREED ORDER CONSOLIDATING CASES—
Entered Jan. 9, 1953.

On motion of counsel for both parties in Civil Actions 2107 and 2228,

It Is Ordered that said cases be consolidated for all purposes.

_____
Judge

Agreed To:

_____
Counsel for Plaintiff

_____
Counsel for Defendants

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Louisville

Civil Action No. 2107

Arthur and Hilda D. Haffer, et al ., - - Plaintiffs,

v.

Alvin A. Voit and
The Mengel Company, - - - - Defendants,

Civil Action No. 2228

Ann F. Ames, - - - - - - - Plaintiff,

v.

Alvin A. Voit, et al. and
The Mengel Company, - - - - Defendants.

FINDINGS OF FACT AND CONCLUSION OF LAW—
Filed Aug. 4, 1953.

Action No. 2107 was filed in the District Court for the Southern District of New York April 30, 1951, by plaintiffs Arthur and Hilda D. Haffer, stockholders of the Mengel Company against Alvin A. Voit and the Mengel Company defendants. The action was transferred to this Court by an order of the District Court for the Southern District of New York April 24, 1951.

Action No. 2228 was filed October 4, 1951 by Ann F. Ames against Alvin A. Voit, Albert L. Entwistle, Walter T. Green, Dulaney Logan, The Mengel Company, Charles G. Middleton and Edward Lane, in this Court.

Findings of Fact and Conclusion of Law

The actions are pending on defendant's motions to require the plaintiff to give security for the costs and motions for summary judgment.

The cases were, by order of this Court January 9, 1953, consolidated for all purposes.

The motion for summary judgment is proper only in the event there is no issue as to the material facts. This Court has concluded that there is no issue as to the material facts and finds the facts from the pleadings and the affidavits undisputed to be as follows—

1. The defendant Mengel Company is a corporation created under the laws of the State of New Jersey with its principal place of business and office at Louisville, Kentucky.

2. The individual defendants in action No. 2228 (Ames case) are citizens of Kentucky and Virginia.

3. Plaintiff Ann F. Ames is a citizen of New York. In action No. 2107, plaintiffs Arthur Haffer and Hilda D. Haffer are citizens of Massachusetts and defendant Alvin A. Voit is a citizen of Kentucky, and the Mengel Company is, as stated above, a New Jersey corporation authorized and licensed to do business in Kentucky.

4. Plaintiff Ann F. Ames, is the holder of fifty shares of the capital stock of the Mengel Company, and acquired her stock July 31, 1947.

Plaintiff Arthur Haffer is the holder of 32 shares of the capital stock of the corporation, which he acquired May 2, 1946 and plaintiff Hilda D. Haffer is the owner of 43 shares which she has owned since December 23, 1948.

There is a total outstanding issue of capital stock in the Mengel Corporation of approximately 580,000, shares.

5. At a special meeting of the stockholders of the Mengel Company held February 27, 1945, two-thirds of the stockholders present or represented, approved the resolution granting the defendant Alvin A. Voit, who was then and is now President of the Mengel Company, an option to purchase 10,000 shares of the unissued common stock of the Mengel Company at a price of $10. per share.

Findings of Fact and Conclusion of Law

The resolution and pertinent portions of the records of the directors' meeting at which the resolution was passed are as follows:

"The Secretary then presented and read to the meeting the resolutions of the Board of Directors adopted at their meeting of May 19, 1944 and December 27, 1944, relating to the granting of an option to Alvin A. Voit, President, to purchase 10,000 shares of the $1.00 Common Stock of the Company.

"Ample opportunity was given for a full and complete discussion of the option and the resolutions pertaining thereto adopted by the Board of Directors, at the close of which the following resolution was duly presented:

"RESOLVED

That an option be granted to Mr. Alvin A. Voit, President of the Company, to purchase 10,000 shares of the unissued $1.00 par value Common Stock of the Mengel Company, or any part thereof, at any time, and from time to time, on or prior to December 31, 1949, at the price of $10.00 per share, and that the resolutions of the Board of Directors with respect thereto adopted at the regular meeting held May 19, 1944, be ratified and approved; provided, however, that no part of this option may be exercised unless Mr. Voit is still in the employ of the Company, and until it is approved by the proper governmental authorities.

"Upon the resolution made and seconded for the granting of a stock option * * * 229,142 shares of the Common Stock were cast FOR

"36,385 shares of the Common Stock were cast AGAINST * * *

"The Chairman thereupon declared * * * that the option to purchase 10,000 shares of the Common Stock of the Company was ratified and approved by action of the stockholders of the Company, subject to the approval of the proper governmental authorities"

Findings of Fact and Conclusion of Law

6. The Mengel Company filed a Listing Application on the New York Stock Exchange on March 6, 1945, in connection with the issue of 10,000 shares of stock to defendant Voit. That listing included the following language—

> "The entire amount of cash to be received at the rate of $10 per share upon exercise of said option will be added to the general funds of the Company, and used for any corporate purpose for which such funds may be devovted.
>
> "The cash so received at the rate of $1 per share of Common Stock issued upon exercise of said option will be credited to capital, and the balance at the rate of $9 per share will be credited to capital surplus, account of the Company."

7. October 21, 1949, The Mengel Directors, by resolution authorized the sale to defendant Voit of 10,000 shares of previously unissued Mengel common stock for $10. per share to be paid by Voit's promissory note for $100,000, with interest at three percent, payable semi-annually and secured by the deposit of the stock as collateral. Mengel was to have no recourse against Voit on the note except to the extent of the collateral, and dividends paid on such shares were to be applied to payment of principal and interest on the note.

8. October 26, 1949, the defendant Voit delivered the promissory note in accordance with the terms of the above quoted resolution, but also providing that Voit could withdraw any number of the shares held as collateral at any time by payment to Mengel of $10. for each share so withdrawn.

9. April 4, 1950, The Mengel Company's Board of Directors gave notice of the annual meeting of stockholders to be held on May 3, 1950. That notice described the purpose of the meeting as follows—

> "(1) To elect a board of seven directors to serve for the ensuing year;

(2) To ratify and approve the appointment of independent public accountants;

(3) To consider and act upon such other business as may properly come before the meeting."

A proxy statement was made at the same time, and it included under part headed—

"Remuneration of Directors and Officers", the following statement—

"(5) By action of the Board of Directors, approved by the stockholders of the Company on February 27, 1945, Mr. Voit was granted an option to purchase 10,000 shares of Common Stock of the Company at $10.00 per share. Mr. Voit exercised this option on October 26, 1949. On the date this option was exercised the highest price at which Common Stock of the Company was sold on the New York Stock Exchange was $10.25 per share. The purchase price of $100,000 for this stock is evidenced by a demand promissory note dated October 26, 1949, executed by Mr. Voit, bearing intrest at the rate of 3% per annum from date, payable semi-annually. Certificates for these 10,000 shares of Common Stock have been issued in the name of Alvin A. Voit, but are held by the Company as security for the payment of the promissory note, above mentioned, it being provided in said promissory note that the Company shall look solely to the 10,000 shares of stock pledged as collateral for the payment of this note. The largest aggregate indebtedness outstanding from Mr. Voit to the Company at any time during 1949 was $100,000, being the promissory note above mentioned. As of March 15, 1950, the aforesaid promissory note was outstanding."

10. Plaintiffs Haffer wrote a letter to the Company stating that they wished to go on record as opposing the Company's acceptance of the note from Voit for the purchase of the stock.

11. The annual meeting of the stockholders of the Mengel Company was held on May 3, 1950, and at the meeting there was no objection to the resolution of the Board of Directors authorizing the issue of the 10,000 shares of the stock to Voit. Seventy-five percent of the shareholders were represented at the meeting.

12. On December 12, 1950, plaintiff Ames filed suit in a New York State Court, to enjoin the Company from executing the stock transaction with Voit. The Company removed this suit to the United States District Court for the Southern District of New York.

13. Plaintiffs Haffer filed suit in the United States District Court for the Southern District of New York to enjoin the stock transaction on March 19, 1951. That suit was transferred to the Western District of Kentucky and is the instant case No. 2107.

14. Plaintiff Ames was unsuccessful in her original suit, on an appeal by The Mengel Company in the Court of Appeals for the Second Circuit—Ames v. Mengel Company, 190 F. 2d 344.

15. Following the filing of the New York suits by plaintiffs Ames and Haffer, the annual meeting of the stockholders of the Mengel Company was held May 2, 1951. Eighty percent of the outstanding stock was represented at this meeting and no objection was raised to the Voit stock transaction.

16. Defendants concede that under the option plan, Voit will receive shares of stock without subjecting himself to financial risk.

17. The purpose of the Directors in granting the stock option to Voit was to increase his incentive to work for the Company as its President. The history of the Company under the guidance of Voit as its President is that the Company has enjoyed prosperity and the Directors felt it was largely due to the ability of Mr. Voit in devising new lines of merchandise.

18. The annual meeting of the stockholders of the Mengel Company held May 2, 1951, reflects no objection to

the resolution of the Board of Directors authorizing the issue of 10,000 shares of stock to Voit.

19. It will be noted by an examination of the opinion in Ames v. Mengel, supra, that the Court held that the allegations of the complaint related purely to a violation of the preemptive rights of the plaintiff as a stockholder. The Court said, at page 346—

> "It was further alleged that the purported exercise of the option by Voit violated 'the preemptive rights of the plaintiff to buy stock of the Corporation' and would 'deprive the plaintiff of her relative position as a stockholder'; that unless enjoined the transfer of the shares to Voit would irreparably damage the plaintiff and other stockholders in similar situations by depriving them of their preemptive right to purchase the stock, by permitting the corporation to honor Voit's exercise of his purported option which the Board of Directors would not thereafter question by demanding an accounting from Voit, and by depriving the plaintiff and all similarly situated stockholders 'of their proportionate position as stockholders of the Corporation.'"

There then followed in the opinion allegations of the complaint relating to the representation of other widely scattered stockholders. The Court further said—

> "The foregoing summary of the amended complaint shows that this is a suit not secondary, to enforce a primary right of the corporation, but one directly against the corporation in which the corporation is not a nominal defendant but the actual one. • • • Its purpose is to prevent by injunction a sale of unissued stock by the corporation which will violate the preemptive rights of the appellee and other stockholders who are in like situation, i.e., to vindicate stockholders' rights and not corporate rights. • • •
>
> "The recoverable damages are measured by the value of the stockholder's right."

Finally, on page 347, the Court reverses the lower Court and dismisses the complaint for lack of jurisdiction because there was, as held by the Court, less than $3,000. involved in the controversy.

In the suit filed in this Court, the prayer of the complaint seeks a rescission of the transaction and an accounting by Voit to Mengel Company, asking a return to Voit of his note and repayment to Mengel by Voit of the loss sustained by Mengel or such profit as Voit has realized on the 10,000 shares, whichever is greater.

A comparison of the Kentucky complaint with the New York complaint reveals that the former seeks no recovery for plaintiff, but only for the corporation.

Plaintiffs have abandoned their claim for individual losses occasioned by the deprivation of the preemptive rights about which they complained in the New York case. Therefore, this, the present action here is a derivative action.

CONCLUSIONS OF LAW

I. The original complaint filed by the plaintiff Ames and the complaint, as now amended, in the Haffer case, set up derivative causes of action, in which the measure of damages is not plaintiffs' individual interests but the corporation's loss alleged to have been occasioned in the stock transaction with Voit. The amount of the alleged loss is in excess of $3,000. and it follows that this Court has jurisdiction of the actions.

The case of Ames v. Mengel, supra, is not in point in this action as it was determinative of the New York action, because in the latter the complaint stated a claim for violation of the plaintiff's preemptive rights by the stock issued to Voit. The action was not a derivative suit but one against the corporation to enforce the stockholders' rights against it. Plaintiff's individual rights were less in value than $3,000., and for that reason the Court dismissed the action for lack of jurisdiction.

There is no complaint in the action in this Court of the loss of preemptive rights. The cases here are true deriva-

tive actions. Koster v. Lumbermen's Mutual Casualty Company, 330 U. E. 518; Hutchinson Boxboard & Paper Company v. Van Horn, 299 Fed. 424 (C. A. 8).

II. The motion of defendant, the Mengel Company, to require plaintiffs to give security for costs which may be incurred by defendant in connection with these cases is overruled for the reason that plaintiffs are not by law required to give such security. Neither Federal law nor the law of Kentucky requires such security to be given. The law of New Jersey requires such security, but that law does not govern the instant cases. The only connection between these cases and the law of New Jersey is the fact that defendant Mengel Company is a New Jersey corporation and this fact alone is insufficient to require the application of the New Jersey Statute. Shieldcrawt v. Moffett, 56 N.Y.S. 2r 134.

The New Jersey Security law would be applicable to this action if it were pending in the New Jersey Court. Cohen v. Beneficial Loan Corporation, 337 U. S. 541.

III. Defendants have moved to dismiss the Ames suit on the grounds (1) that neither the plaintiffs nor defendants are citizens or residents of Kentucky. This ground is without merit.

In a stockholder's derivative suit, such as this, the action may be prosecuted in any district in which the corporation could have sued the same defendants and it is immaterial that one of the defendants is a non-resident of the District. Title 28 U. S. C. 1401 and 1391(c). Freiday v. Cowdin (S. D. N. Y.) 83 Fed. Supp. 516.

(2) Dismissal is sought of the Ames suit on the ground that the prior Haffer suit involved the same parties and issues pending in this Court. The parties have by agreement consolidated the two cases, the effect of which order of consolidation was to make one suit. National Union Fire Insurance Company v. C. & O. Railway Company, 4 Fed. Supp. 25.

(3) They move to dismiss the Ames suit on the ground that the plaintiff has adequate remedy at law. This, how-

ever, is a stockholder's derivative action. Such actions are cognizable only in equity.

(4) Defendants seek dismissal of the Ames suit alleging that there is no basis in law for the plaintiff to represent other stockholders.

The smallness of plaintiff's interest will not defeat her right to sue under Rule 23 of the Federal Rules of Civil Procedure—

> "* * * in derivative actions, although the plaintiff may have a substantial interest of his own to protect, he may also be a mere phantom plaintiff with interest enough to enable him to institute the action and little more."

Koster v. Lumbermen's Mutual Company, supra. See also Goldi v. Jones, 141 F. 2d 984 (C. A. 2).

IV. The transaction resulting in the issuance of the 10,000 shares of Mengel stock to defendant Voit is not per se improper. The transaction may or may not amount to a gift of the stock from Mengel to Voit. Though it be considered to be a gift, plaintiff Ames concedes that under the law of New Jersey, under proper circumstances, such a gift might be made.

Chapter 9 of the General Corporation Act of New Jersey includes under the heading "Beneficial Provisions for Employees", various permissible schemes for transfer of corporate shares by a corporation to its employees. New Jersey law provides for corporations to establish stock participations plans, under which a corporation may give to its President an incentive in the form of stock to enhance the prosperity of the corporation, but the question in this case is, did the Directors proceed in accordance with the New Jersey law?

V. *The substance of the stock option transaction is that the Mengel Company makes a gift of 10,000 shares of common stock to the defendant Voit,* consummation of the gift to be deferred until the stock involved shall have accrued dividends sufficient to pay the principal of the value of the stock and interest.

Defendant Voit never became obligated personally to pay for the shares and he suffers no financial risk by the execution of the note.

VI. The Mengel Directors did not comply with the New Jersey law permitting a gift of stock to an employee as part of an incentive program.

Section 141:9-2 of the New Jersey law provides in part—

> "The Board of Directors shall first formulate such plan and pass a resolution declaring that in its opinion, the adoption thereof is advisable and calling a meeting of the stockholders to take action thereon."

The Directors, in this case, called the stockholders' meeting and then formulated the plan by which Voit received his stock. *There was a material variance between the resolution which the stockholders approved February 27, 1945, and the resolution which the Directors passed on October 21, 1949, which latter purported to implement the plan previously authorized by the stockholders.*

The former resolution stated in its essential provision that Voit was to have an option to buy 10,000 shares of the stock at $10. per share, the option to be exercised before December 31, 1949, provided Voit remained in the Company's employ.

The resolution, as finally adopted, included provisions that the option should be exercised by Voit executing a note on which he would have no personal liability and that the dividends earned by the stock were to be used to pay off the note, *so that in substance, the Directors authorized a gift of the shares to Voit. Of this, the stockholders were unadvised at the meeting of February 27, 1945.*

VII. Plaintiffs were not bound to comply with the New Jersey law requiring objecting minority stockholders to submit their shares for appraisal and to be bought out by the corporation. There might be force in this defense, if the shareholders had had an opportunity to register an objection. The option granted to the defendant Voit was

not submitted to the stockholders' meeting of February 27, 1945, and actually at no other time.

VIII. The stockholders at the meeting of May 3, 1950 and May 2, 1951, (both subsequent to the Director's resolution of October 21, 1949 and Voit's exercise of his option on October 26, 1949) did not ratify the action taken by the Directors allowing Voit to exercise his option without financial obligation.

The stockholders would be entitled to a full disclosure of the action proposed to be taken and there had never been at a stockholders' meeting a full disclosure as to how the Voit stock option would be ultimately carried out.

The proxy statement, issued prior to the 1950 stockholders' meeting, made no mention of the fact that the debt evidenced by Voit's $100,000. note would be paid solely out of dividends earned by the stock which Mr. Voit was buying.

IX. There was no complete disclosure of all the material facts. The plaintiffs Haffer had protested the matter by letter and the plaintiff Ames filed suit within the year 1950, the year in which the stockholders became aware of the manner in which Voit was to exercse his option.

The Court, therefore, concludes that plaintiffs are entitled to a summary judgment.

An order to that effect will be tendered by Counsel for Plaintiffs, on notice to Defendants' Counsel.

Roy M. Shelbourne
United States District Judge

(Emphasis ours)

Aug. 4, 1953

Israel Beckhardt
18 East 41st Street
Borough of Manhattan
New York, N.Y.

L. Lyne Smith, Jr.,
Kentucky Home Life Building
Louisville, Kentucky

Attorneys for Plaintiffs

Arthur Haffer and Hilda D. Haffer
Woodward, Hobson & Fulton
Kentucky Home Life Building
Louisville, Kentucky
Attorneys for Plaintiff
Ann F. Ames

Middleton, Seelbach, Wolford, Willis & Cochran
501 South Second Street
Louisville, Kentucky
Attorneys for Defendants

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Louisville

Civil Action 2107

Arthur and Hilda D. Haffer, et al., - - Plaintiffs,

v.

Alvin A. Voit and
The Mengel Company, - - - - - Defendants.

Civil Action 2228

Ann F. Ames, - - - - - - - Plaintiff,

v.

Alvin A. Voit and
The Mengel Company, - - - - Defendants.

INFORMAL REQUEST BEFORE JUDGMENT FOR THE COURT TO CHANGE ITS CONCLUSION OF LAW HOLDING THAT THE BOARD OF DIRECTORS DID NOT CONFORM TO THE NEW JERSEY STATUTES IN GRANTING VOIT THE OPTION TO PURCHASE 10,000 SHARES OF STOCK AT $10.00 PER SHARE—Filed August 21, 1953.

The reason for this request is that the New Jersey Statutes, under which the option was granted, were amended in 1948 and the amendment was not called to the attention of the Court either by plaintiffs' counsel or defendants' counsel.

Informal Request Before Judgment

The amendment changed the statutory law on the subject of stock option plans and conferred upon the Board of Directors the authority to amend or revise any stock option plan which had theretofore been or was thereafter adopted by the stockholders. The amendment changed Section 14:9-4 of Chapter 9 of the General Corporation Law of the State of New Jersey.

The defendants state they are calling the attention of the Court to this amendment as soon as they found out that such an amendment had been adopted.

(s) Leo T. Wolford
(s) Louis Seelbach
(s) Edwin G. Middleton
(s) Charles Middleton
Attorneys for Defendants.

PLAINTIFFS' EXHIBIT "E"—Filed Oct. 30, 1953.

STATE OF NEW JERSEY
Department of Eduaction
State House Annex
Trenton 7

Division of the State Library
Archives and History

October 13, 1953

This is to certify that the following is a true copy of the statement which appears on the printed bill, Senate No. 101, State of New Jersey, introduced January 26, 1948, by Alfred C. Clapp, which bill is part of the collection of the New Jersey State Library which is under my custody:

STATEMENT

R.S. 14:9-1 to 7, which is a part of the Corporation Act, provides for the creation of a plan for stock participation

and benefits for employees, either in the original articles of incorporation or by a plan adopted at a meeting of the stockholders. In the majority of cases the plan has been adopted by the stockholders after the incorporation of the company. R.S. 14:9-4 provides that the plan, when once adopted by the stockholders, can only be amended in the same manner as is provided for its adoption, namely, by a meeting and vote of the stockholders. This provision especially in large corporations having many stockholders, makes it difficult, if not impracticable, in many cases to amend a plan *even in minor matters,* once it has been adopted. Experience shows that *minor changes and modifications in a plan* after it has once been put into operation frequently are desirable.

The bill is designed to facilitate the amendment of a plan adopted by the stockholders by permitting the directors to change or amend the plan, *in minor matters,* not affecting the vested interests of the employees. Any changes or amendments made by the directors are subject to the right of the stockholders to alter, change or repeal the amendments, the same as is provided in the Corporation Act with respect to by-laws made by the directors (R.S. 14:3-2).

The suggested amendments work for the benefit of the corporation, the stockholders and the employees. They facilitate the making of *minor amendments* by the directors without the necessity of calling a stockholders meeting, and at the same time, fully protect the employees. They prohibit the directors, in making amendments, from affecting the rights of the employees in any stock of the corporation to which they may have subscribed, or in any participation in the management of the corporation which the plan may give them. The Amendments also prohibit the directors from curtailing in any respect the pensions or other benefits to which the employees may be entitled.

MEC/lp

(s) Roger McDonough
Director

(Emphasis ours)

Exhibit "E"

STATE OF NEW JERSEY
DEPARTMENT OF STATE

I, the Secretary Of State of the State of New Jersey, do hereby certify that Roger H. McDonough, Esquire, who hath signed the foregoing Certificate, was, at the doing thereof, and now is Director Of The Division Of The State Library, Archives And History in and for the State Of New Jersey duly appointed, commissioned and sworn according to law, and that full faith and credit are to be given to his official attestations, and I further certify that the said signature is in the proper handwriting of the said Roger H. McDonough.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Trenton, this 13th day of October, A.D. 1953.

(Seal)

Lloyd B. Marsh
Secretary of State

STATE OF NEW JERSEY

I, The Governor Of The State Of New Jersey, do hereby certify that Lloyd B. Marsh, Esquire, who hath signed the annexed Certificate, and whose Official Seal is thereto annexed, was, at the doing thereof, and now is, Secretary Of State of the State of New Jersey, duly appointed, commissioned and sworn, and that full faith and credit are to be given to his official attestations, that the said signature is in the proper handwriting of the said Lloyd B. Marsh, and the seal his seal of office, and that said Certificate is in due form of law and by the proper officer.

In Testimony Whereof, I have hereunto set my hand and caused the Great Seal of the State Of New Jersey to be hereunto affixed, at the city of Trenton, in said State, this 13th day of October in the year of our Lord One Thousand Nine Hundred and Fifty-three.

(Seal)

By the Governor,
Lloyd B. Marsh
Secretary of State.

Alfred E. Driscoll,
Governor

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Louisville

Civil Action No. 2107

Arthur and Hilda D. Haffer, et al., - - Plaintiffs,

v.

Alvin Voit and
The Mengel Company, - - - - - Defendants.

Civil Action No. 2228

Ann F. Ames, - - - - - - - - Plaintiffs,

v.

Alvin A. Voit and
The Mengel Company, - - - - - Defendants.

REVISED AND SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 13, 1954.

Under date of August 4, 1953, this Court filed its findings of fact and conclusions of law in the above numbered cases, which were consolidated by Court order entered January 9, 1953.

Shortly after the findings of fact and conclusions of law were filed, the defendants filed a written motion that the Court change its conclusions of law to the effect that the Board of Directors of the Mengel Company did not

conform to the New Jersey Statutes in granting to Voit an option to purchase 10,000 shares of stock at $10.00 per share.

The reason alleged by defendants in support of the motion, as stated in the motion, was that "the New Jersey Statutes, under which the option was granted, were amended in 1948 and the amendment was not called to the attention of the Court either by plaintiff's Counsel or defendant's counsel."

An oral argument on defendants' motion was had August 31, 1953 and since that time the parties have filed numerous briefs. Defendants filed the affidavit of the Secretary of the Mengel Company in support of an additional motion for a summary judgment in the Ames case, on the grounds that the plaintiff Ames was not at the time of the submission of this action and was not at any time subsequent to January 1953, a stockholder of record, of any of the stock of the Mengel Corporation.

The Court is of the opinion that it is unnecessary to determine Ames' status as a stockholder, and therefore, withdraws the first sentence of paragraph No. 4 of the finding of fact relative to the Ames' ownership of stock.

The Court further revises and supplements findings of fact number 17 and conclusions of law V, VI, VII, VIII and IX, all of which revision is made necessary by the 1948 amendment to the New Jersey corporation law.

The granting of the option to Voit was an incentive measure permitted by Section 14:9-1 of the New Jersey General Corporation Act, which provides—

> "Employees' Stock Participation; Acquisition of Stock; Sharing Profits; Furnishing Benefits; Electing Directors. Any stock corporation formed under any law of this state may, upon such terms and conditions as may be determined in such manner hereinafter designated, provide and carry out a plan or plans for any or all of the following purposes:
>
> "a. The issue or the purchase and sale of its capital stock to any or all of its employees and those actively

engaged in the conduct of its business or to trustees on their behalf, and the payment for such stock in installments or at one time, with or without the right to vote thereon pending payment therefor in full, and for aiding any such employees and other persons in paying for such stock by contributions, compensation for services, or otherwise.

"b. The participation by all or any of its employees and those actively engaged in the conduct of its business in the profits of the corporate enterprise or of any branch or division thereof. The participation may be based upon length or nature of service, amount of compensation paid or shares owned or upon such other basis as may be selected for the purpose, and may be in cash or by deliver of shares of its capital stock held by it, or issued or purchased by it for the purpose. Such share in the profits shall be regarded as a part of the corporation's legitimate expenses."

The formulation of the option plan was covered by Section 14:9-2 of that Act, which provides—

"EXERCISE OF PRIVILEGES AND POWERS; PROVISION IN CHARTER; FORMULATION OF PLANS AND SUBMISSION TO STOCKHOLDERS.

"Any of such privileges and powers may be exercised by including appropriate clauses therefor in the original articles of incorporation or in the by-laws at the time of organizing the corporation, or, where the corporation has been formed without such charter or by-law provisions, the board of directors shall first formulate such plan and pass a resolution declaring that in its opinion the adoption thereof is advisable, and calling a meeting of the stockholders to take action thereon. The stockholders' meeting shall be held upon such notice as the by-laws provide, and in the absence of such provivsions upon ten days' notice given personally or by mail. If two-thirds in interest or each class of stockholders present at the meeting and voting

shall vote in favor of any such plan or any modification thereof, it shall thereupon become operative."

The Directors of Mengel complied with Sections 14:9-1 and 14:9-2 when the option plan was formulated in their resolution in 1944 and approved by more than two-thirds of the stockholders in their special meeting on February 27, 1945. Such actions by the Directors and stockholders validly brought into being the Voit stock option plan.

The literal terms of the stock option resolution, coupled with the language contained in the Listing Application on the New York Stock Exchange filed by Mengel on March 6, 1945, made no mention of the fact that the option could be exercised on a credit basis, and in fact inferred that cash was to be received by the corporation in the event Voit exercised the option.

October 21, 1949, the directors passed a resolution which authorized Voit to exercise his option without paying cash immediately upon the exercise of the option and permitted him to give a note for the stock, which did not pledge his credit except to the extent of the collateral stock. This constituted an amendment or revision of the original stock option plan.

The New Jersey law, under which this case was originally argued, and upon which this Court bottomed the conclusion of law, which in the opinion of this Court nullified the transaction as a sale and made it a gift from the corporation to Voit, was as follows—

"14:9-4 CHANGE OF PLANS. Any plan so adopted may be recalled, abolished, revised, amended, altered or changed in the same manner as is herein provided for its adoption, subject, however, to the restoration by the corporation of any moneys contributed by employees or those actively engaged in the conduct of the corporate business, and for which no stock or other equivalent has been issued."

However, neither the Court nor Counsel knew nor discovered that the New Jersey Statutes had been amended and that the amendment was as follows:

"14:9-4 (As amended) RECALLING, AMENDING OR REVISING PLANS; ALTERATION OR REPEAL BY STOCKHOLDERS. Any plan so adopted may be recalled or abolished in the same manner as is herein provided for its adoption subject, however, to the restoration from any trust fund created by such corporation for carrying out or effectuating any such plan, or by the corporation if no such trust fund has been created, of any moneys contributed by employees or those actively engaged in the conduct of the corporate business, and for which no stock or other equivalent has been issued.

"Any plan heretofore adopted or which may hereafter be adopted by any corporation of this State may be amended or revised by the board of directors of the corporation by resolution of said board; provided, however, that no such amendment shall be effective which shall attempt to (1) deprive any employee of any shares of the capital stock of the corporation which he may have acquired through or as a result of said pension plan; (2) deprive any employee of his right to participate in the profits of the corporate enterprise or any branch or division thereof; or (3) divert any part of the fund whether corpus or income which may have been set up by the corporation to provide for the payment to or for the benefit of the employees of the corporation, or any corporation a subsidiary thereof or affiliated therewith, of pensions during old age, disability or unemployment or for the relief or general welfare of any or all of such employees.

"Any amendment to or revision of the plan so made by the directors of the corporation may be altered, changed or repealed by the stockholders. As amended L1948, c. 93, p. 530, Sec. 1. Effective May 28, 1948."

It is apparent that under the law prior to the amend-

ment, the directors could not have altered the Voit stock option plan, unless two-thirds of the stockholders had joined in adopting the revision or amendment. Under the new 1948 amendment, however, the directors alone could amend or revise the stock option plan once established and the stockholders could alter, change or repeal any amendment or revision brought about by the directors.

The significance of this amendment is two-fold in this action. First, no action had to be permitted under Rule 23 of the Rules of Civil Procedure, unless the complaining minority stockholders show a good faith effort to bring about the alteration, change or repeal by the stockholders of the corporation. No allegation is made in this case that the matter was presented by any of the plaintiffs to the stockholders.

The second significance is that the statute has changed the right of the directors to revise or amend the original stock option plan approved by two-thirds of the stockholders, by giving the stockholders the absolute right to nullify the said amendment or revision.

The plaintiffs, in this case, argue that the 1948 amendment permits only minor revisions or amendments and that here the directors made a more than minor revision or amendment, and finally they argue that the 1948 amendment is unconstitutional if construed to permit the action taken by the directors in this case.

The amendment does not contain the words "minor revisions or amendments", but provides that "any plan heretofore adopted or which may hereafter be adopted by any corporation of this State may be amended or revised by the board of directors of the corporation by resolution of said board."

The Court construed this statute to permit directors to amend or revise the stock option plan so as to allow the defendant Voit to give his promissory note for the shares of stock, pledging only the stock as security for the payment of the note.

Plaintiffs rely in support of their claim that the statute is unconstitutional on Grupe v. Rudisill, 101 N. J. Eq. 145,

136 Atl. 911. In support of their position, the plaintiffs assert that the "charter and by-laws of the Mengel Company * * * provide that a vote of two-thirds of the stockholders of Mengel Company is necessary in order to issue the stock or grant the option".

This statement is not supported by the record and it is shown by defendants that the articles of incorporation of Mengel provide—

> "Common stock may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors."

The Grupe case is authority that the charter provisions constitute a contract among stockholders and that where a charter requires a three-fourths vote of the shareholders in order to dispose of corporate property, a statute attempting to permit disposition of such property by the directors is unconstitutional because impairing the obligation of the contract.

The amendment here involved makes no attempt to alter any pre-existing charter right and the Grupe case is not in point.

Following the directors' action, on October 21, 1949, amending the stock option plan, their action was disclosed to the stockholders in the notice of the annual meeting of stockholders to be held on May 3, 1950.

Apparently, no mention of the action by the directors was brought up at the stockholders' meeting. Haffer, meanwhile, had written the Company registering his objection to the directors' action and the plaintiff Ames had filed suit in the New York State Court, but neither Haffer nor Ames appeared at the stockholders' meeting on May 3, 1950, or May 2, 1951, to protest or propose an alteration, amendment or rescission of the action of the directors in changing the stock option plan.

There can be no doubt that the last paragraph of Section 14:9-4 of the New Jersey Statute, as amended, providing for—

"Any amendment to or revision of the plan so made by the directors of the corporation may be altered, changed or repealed by the stockholders."

Provided the plaintiffs here with ample remedy should the stockholders agree with them.

Plaintiffs contend that the remedy was of no avail, because when the corporation received the note from Voit there was consummated a contract and no action on the part of the stockholders or corporation could take away from Voit the benefits unless he assented to a rescision of the contract. This contention overlooks the intention and purpose of the statute, which specifically makes the contract executed pursuant to the revised stock option plan subject to repeal by the stockholders.

None of the plaintiffs offer a satisfactory explanation of their failure to appear before the stockholders' meeting in protest of the directors' change in the stock option plan.

Rule 23(b) of the Rules of Civil Procedure provides, as a condition precedent to bringing actions of this kind, that the "complaint shall also set forth with particularity the efforts of the plaintiff to secure * * * from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort". See Long v. Stites, 88 F. 2d 554 (C.A. 6), and In Re Western Tool & Manufacturing Company, 142 F. 2d 404 (C.A. 6).

The Court is now of the opinion that the defendants are entitled to a summary judgment and Counsel for defendants will present such judgment, on notice to plaintiffs' Counsel.

Roy M. Shelbourne
January 13, 1954. United States District Judge

For the plaintiffs—

L. Lyne Smith, Jr.,
Woodward, Hobson & Fulton
Kentucky Home Life Bldg.
Louisville, Kentucky

For the defendants—

Middleton, Seelbach, Wolford, Willis & Cochran
501 South Second Street
Louisville, Kentucky

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Louisville

Civil Action No. 2107

Arthur and Hilda D. Haffer, et al., - - Plaintiffs,

v.

Alvin A. Voit and
The Mengel Company, - - - - - Defendants.

Civil Action No. 2228

Ann F. Ames, - - - - - - - Plaintiff,

v.

Alvin A. Voit, et al., and
The Mengel Company, - - - - Defendants.

PLAINTIFFS' EXHIBIT "I"—Filed Jan. 14, 1954.

SUPPLEMENTAL AFFIDAVIT OF SIDNEY L. GARWIN.

State of New York }
County of New York } ss:

Sidney L. Garwin, being duly sworn, deposes and says:

I have made an investigation of the facts hereinafter set forth and the files of the Securities and Exchange Commission, Moody's, Fitch's and various other publications.

On January 20, 1945, the market price for the common stock of the Mengel Company was $15.00. On February 22, 1945, the closing price for the common stock of the Mengel Company was 15-7/8.

Supplemental Affidavit of Sidney L. Garwin

An exhaustive search of the files and records of the Securities and Exchange Commission does not reveal any contract of employment with Voit during the years 1949 to the present time. It does reveal that during the year 1949, Voit received in salaries from Mengel $40,000.00 and that for the years 1950, 1951 and 1952 he received a salary each year of $55,000.00.

Mengel has paid on each share of common stock the following dividends:

1949.....	$ .75
1950.....	1.05
1951.....	1.75
1952.....	1.00

Annexed hereto and made a part hereof is a correct copy of the statement appended to the amendment of Section 14:9-4 of the General Corporation Act of the State of New Jersey. It is the total and only expression of intent of the legislature of New Jersey in passing said bill.

Sworn to before me this
8 day of October, 1953.

Sidney L. Garwin
Harry B. Coran
Notary Public, State of New York
Qualified in Kings County
No. 24-5814450
Cert. filed with N. Y. Co. Clk.
Commission Expires March 30, 1954

PLAINTIFFS' EXHIBIT "J"—Filed Jan. 14, 1954.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Louisville

Civil Action No. 2107

Arthur and Hilda D. Haffer, et al., - - Plaintiffs,

v.

Alvin A. Voit and
The Mengel Company, - - - - - Defendants.

Civil Action No. 2228

Ann F. Ames, - - - - - - - Plaintiff,

v.

Alvin A. Voit, et al., and
The Mengel Company, - - - - Defendants.

SUPPLEMENTAL AFFIDAVIT OF ANN F. AMES.

State of New York }
County of New York } ss:

Ann F. Ames, being duly sworn, deposes and says:

I am one of the plaintiffs in the above entitled action.

On July 31, 1947 I purchased 50 shares of Mengel stock at a total cost of $989.60. That stock was held in the name of my broker, Joseph Farol Company. On March 9, 1949 I changed my broker and the 50 shares of Mengel stock was transferred to me and I became a stockholder of record. On December 30, 1952 I acquired an additional 50 shares

of the common stock of the Mengel Company. This additional 50 shares of the common stock of the Mengel Company, beneficially owned by me, was held in the name of my broker, Abraham and Company, stockbrokers located at 120 Broadway, New York City.

Subsequently as stated in the affidavit of Mr. Meloy, I sold the 50 shares of stock purchased by me on July 31, 1947 for a net price of $631.88. I retained the 50 shares of stock beneficially owned by me and held to my account in the name of Abraham and Company. I still own 50 shares of stock of the Mengel Company and I have continuously, since July 31, 1947, owned shares of stock of the Mengel Company.

As additional corroboration I am annexing hereto the affidavit of Aaron Schwalberg, a member of the firm of Abraham and Company, to attest to the fact that they are holding for my account, continuously since December 30, 1952, 50 shares of the common stock of the Mengel Company.

Sworn to before me this
8 day of October, 1953.

Ann F. Ames
Harry B. Coran
Notary Public, State of New York
Qualified in Kings County
No. 24-5814450
Cert. filed with N. Y. Co. Clk.
Commission Expires March 30, 1954

PLAINTIFFS' EXHIBIT "K"—Filed Jan. 14, 1954.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Louisville
Civil Action No. 2107

Arthur and Hilda D. Haffer, Et Al., - - Plaintiffs,

v.

Alvin A. Voit and
The Mengel Company, - - - - - Defendants.

Civil Action No. 2228

Ann F. Ames, - - - - - - - - Plaintiff,

v.

Alvin A. Voit, Et Al., and
The Mengel Company, - - - - - Defendants.

SUPPLEMENTAL AFFIDAVIT OF AARON SCHWALBERG.

State of New York }
County of New York } ss:

Aaron Schwalberg, being duly sworn, deposes and says:

I am a member of the firm of Abraham and Company.

Abraham and Company are stockbrokers located at 120 Broadway, New York City and are members of the New York Stock Exchange.

On December 30, 1952 Ann F. Ames was the owner of 50 shares of the common stock of the Mengel Company

held in the name of Abraham and Company, which stock was held by our firm for her account.

That continuously since that date the same 50 shares of stock of the Mengel Company has been held in the name of Abraham and Company for the account of Ann F. Ames, who continues to be the beneficial owner of said stock.

Sworn to before me this
day of October, 1953.

_____.

In the

DISTRICT COURT OF THE UNITED STATES

For the Western District of Kentucky

Civil Action No. 2228

Ann F. Ames, - - - - - - - - Plaintiff,

v.

Alvin A. Voit, Et Al., - - - - - Defendants.

Civil Action No. 2107

Arthur Haffer and
Hilda D. Haffer, - - - - - - - Plaintiffs,

v.

Alvin A. Voit, Et Al., - - - - Defendants.

JUDGMENT—Filed January 14, 1954.

This cause coming on to be heard and an agreed order having been entered consolidating the causes, and having been submitted on various motions of both parties, and upon the undenied allegations in the pleadings and various

affidavits setting forth the important facts of the case, and on the plaintiffs' motion for a summary judgment, and the defendants' plea that the complaint failed to state a cause of action against the defendant, or any of them, upon which relief could be granted and the same being treated as a motion for a summary judgment, and the case having been argued by counsel on several occasions, and the Court being advised,

It Is Ordered, Adjudged And Decreed:

That the plaintiffs' motion for a summary judgment be and the same hereby is overruled and that the defendants' motion for a summary judgment be and the same hereby is sustained, and that both causes be and the same hereby are dismissed on the merits, and that the defendants have and recover from the plaintiffs their costs in the action incurred, and that the defendants have execution therefor.

_____,
Judge.

Have Seen:

_____,
Attorney for Plaintiffs.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Louisville

Civil Action No. 2107

Arthur and Hilda Haffer, Et Al., - - Plaintiffs,

v.

Alvin A. Voit and
The Mengel Company, - - - - - Defendants.

Civil Action No. 2228

Ann F. Ames, - - - - - - - - - Plaintiff,

v.

Alvin A. Voit and
The Mengel Company, - - - - - Defendants.

MOTION TO AMEND FINDINGS OF FACT AND LAW AND TO AMEND JUDGMENT—Filed January 20, 1954.

Plaintiffs, by counsel, move the Court to amend its revised and supplemental Findings of Fact and conclusions of law, entered January 13, 1954, to delete therefrom the following findings of fact by the Court on page 6 thereof:

> "This statement is not supported by the record and it is shown by defendants that the Articles of Incorporation of Mengel provided—'common stock may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors' ".

Said statement should be deleted because the statement by the Court that the defendants have shown that the Articles of Incorporation of Mengel Company provide that "common stock may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors" is not supported by the record. There is no evidence in the record that the Articles of Incorporation of Mengel Company do so provide; and on the contrary, the By-laws of Mengel Company provide that a vote of two-thirds of the stockholders is necessary in order to issue stock or grant the option.

Woodward, Hobson & Fulton,
1805 Kentucky Home Life Bldg.,
Louisville, Kentucky,
By L. Lyne Smith, Jr.

I certify that I have, this 20 day of January, 1954, mailed a copy of the foregoing motion to Middleton, Seelbach, Wolford, Willis & Cochran, Attorneys for defendants herein.

L. Lyne Smith, Jr.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky

Civil Action No. 2228

Ann F. Ames, - - - - - - - - - Plaintiff,

v.

Alvin A. Voit, Et Al., - - - - - Defendants.

Civil Action No. 2107

Arthur Haffer and
Hilda D. Haffer, - - - - - - - - Plaintiffs,

v.

Alvin A. Voit, Et Al., - - - - - Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO AMEND FINDINGS OF FACT AND LAW AND TO AMEND JUDGMENT—Filed Jan. 28, 1954.

Defendants by counsel, in response to plaintiff's motion to amend the findings of fact and conclusions of law and to amend the judgment, request that the Court overrule the said motion.

Defendants file herewith in support of the request an affidavit of C. O. Meloy quoting the applicable portions of The Mengel Company Charter showing that it does not contain a provision requiring a two-thirds vote of the stockholders prior to issuance of stock.

Defendants further state that plaintiff's motion is contrary to fact when it states that the Bylaws of The Mengel Company provide that a vote of two-thirds of the stockholders is necessary in order to issue stock or grant the

option, and that he has gone beyond the record in so asserting, when in truth and fact the Bylaws contain no such provision, as shown by the excerpt from the Bylaws contained in the affidavit.

_____,
Counsel for Defendants.

UNITED STATES DISTRICT COURT
Western District of Kentucky
At Louisville

Civil No. 2107

Arthur and Hilda Haffer,

v.

Alvin A. Voit and
The Mengel Company.

and

Civil No. 2228

Ann F. Ames,

v.

Alvin A. Voit and
The Mengel Company, Et Al.

ORDER—Filed January 28, 1954.

The Motion to Amend Findings of Fact and Law and to Amend Judgment herein, having been heard by the Court, is overruled.

Roy M. Shelbourne,
Judge.

January 28th, 1954.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit
Civil No. 2107

Arthur and Hilda Haffer,

v.

Alvin A. Voit and
The Mengel Company.
and

Civil No. 2228

Ann F. Ames,

v.

Alvin A. Voit and
The Mengel Company.

NOTICE OF APPEAL UNDER RULE 73B—Filed February 4, 1954.

Notice is hereby given that the plaintiffs, Arthur and Hilda Haffer and Ann F. Ames, in the above styled suits hereby appeal to the United States Court of Appeals for the Sixth Circuit from the final judgment entered in this suit on January 14, 1954.

Woodward, Hobson & Fulton,
1805 Kentucky Home Life Bldg.,
Louisville, Kentucky,
By L. Lyne Smith, Jr.,
Attorneys for Plaintiffs.

I certify that I, this 4th day of February, 1954, mailed a copy of the foregoing Notice to Messrs. Middleton, Seelbach, Wolford, Willis & Cochran, 501 S. Second Street, Attorneys for defendants.

L. Lyne Smith, Jr.

STATUTES.

New Jersey Revised Statutes (General Corporation Law).

14:2–9 **Amendment or repeal of title; charter subject to discretion of legislature.** This title may be amended or repealed at the pleasure of the legislature and every corporation created hereunder shall be bound by such amendment or repeal. Such amendments or repeal shall not take away or impair any remedy against a corporation or its officers for any liability which shall have been previously incurred.

The charter of every corporation or any supplement thereto or amendment thereof shall be subject to alteration, suspension and repeal, in the discretion of the legislature, and the legislature may at pleasure dissolve any corporation.

14:9–5 **Powers of article additional.** The privileges and powers conferred by this article shall be in addition to and independent of all powers and authority conferred by any other law, and not in restriction or limitation of any of the powers of corporations of this state.

A resolution or by-law adopted or approved prior to June thirteenth, one thousand nine hundred and thirty-two, by a majority vote of the stockholders of a corporation entitled to vote thereon shall be valid from the time of such adoption or approval to the extent that it contains terms which might be embodied in a plan or plans authorized by this article.

Federal Rules of Civil Procedure.

Rule 23(b) **Secondary action by shareholders.** In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce the rights which may be properly asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter

devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

DISTRICT COURT OF THE UNITED STATES
Southern District of New York

Arthur Haffer and Hilda D. Haffer, suing on behalf of themselves and all other stockholders of The Mengel Company, similarly situated, - - - - - - - - - Plaintiffs,

against

Alvin A. Voit and The Mengel Company, - Defendants.

COMPLAINT—Filed March 19, 1951.

Plaintiffs, suing on behalf of themselves, and representatively, on behalf of all other stockholders of The Mengel Company who are similarly situated, for their complaint against the defendants, allege, upon information and belief, except as to Paragraphs "1" and "2," which are alleged on knowledge:

1. Plaintiff, Arthur Haffer, now and at all times since on or about May 2, 1946 is and has been the owner and holder of shares of the common stock of The Mengel Company (hereinafter called "Mengel"). Plaintiff, Hilda D. Haffer, now and at all times since on or about December 23, 1948 is and has been the owner and holder of shares of the common stock of Mengel.

2. Plaintiffs are citizens of the Commonwealth of Massachusetts.

3. The defendant, Alvin A. Voit, is a citizen of the State of Kentucky.

4. Mengel is a New Jersey Corporation, and is doing business in this District.

5. Jurisdiction of this action is based upon the diversity of citizenship of the parties hereto.

6. This action is not a collusive one brought to confer jurisdiction on this court of an action of which it would not otherwise have jurisdiction.

7. The matter in controversy in this action exceeds the sum of $3,000.00 exclusive of interest and costs.

8. The charter of Mengel requires that two-thirds of the stockholders, at a meeting called for that purpose, consent to any authorization for the issuance of additional stock.

9. (a) By a notice dated January 22, 1945, Mengel called a special meeting of its stockholders to be held on February 27, 1945, for the purpose of acting on a previously adopted resolution of the Board of Directors granting the defendant, Alvin A. Voit, an option to purchase 10,000 shares of the unissued common stock of Mengel prior to January 1, 1950, at a price of $10.00 per share. It was contemplated that such option be exercised by cash payments upon the exercise thereof.

(b) At said special meeting of the stockholders of Mengel, held on or about February 27, 1945, by affirmative vote of more than two-thirds of the stockholders present said resolution of the Board of Directors granting the aforesaid option to the defendant, Alvin A. Voit, was approved.

10. On or about October 21, 1949, the directors of Mengel adopted a resolution providing for the sale to the defendant, Alvin A. Voit, of 10,000 shares of the theretofore unissued stock of Mengel for the purchase price of $100,000., payment of which was permitted to be made by the defendant, Alvin A. Voit, delivering to the corporation his promissory note for $100,000., bearing interest at a rate of 3% payable semi-annually with a specific provision that the corporation is to have no recourse against the maker of the note except to the extent of the stock deposited as collateral security therefor, and that the corporation should look solely to the collateral (viz.: the said 10,000 shares of theretofore unissued stock of Mengel) pledged for the payment of said note, and further providing that dividends on the said shares so held as security were to be applied towards the payment of the interest and principal of said note.

11. On or about October 26, 1949, the defendant, Alvin A. Voit, attempted to purchase the said theretofore unissued 10,000 shares of the common stock of Mengel by delivering to Mengel his promissory note in the sum of

$100,000., payable on demand, bearing interest at the rate of 3% per annum semi-annually, providing that it be secured with the said 10,000 shares of theretofore unissued common stock of Mengel, further providing the right to defendant, Alvin A. Voit, to take possession of such quantities of shares which were held as collateral as he might from time to time desire to take, by making payments on the principal of said note at the rate of $10.00 in cash for each such share he might take.

12. Such purported purchase by the defendant, Alvin A. Voit, of said 10,000 shares of theretofore unissued common stock of Mengel was invalid and without effect because it had not been approved or consented to by two-thirds of the stockholders of Mengel.

13. Such purported sale of 10,000 shares of theretofore unissued common stock of Mengel to the defendant, Alvin A. Voit, was not an exercise of the option granted and approved by the stockholders of Mengel at the meeting held on or about January 22, 1945, for the reason that the terms of said sale differed from the terms of said option.

14. Such purported sale of 10,000 shares of the theretofore unissued common stock of Mengel to the defendant, Alvin A. Voit, was not an exercise of the option granted and approved by the stockholders of Mengel at the meeting held on or about January 22, 1945, for the reason that the terms of said sale failed to provide for any real payment for said stock by defendant, Alvin A. Voit, and provided no binding obligation for the defendant, Alvin A. Voit, at any time to make payment therefor.

15. Such purported sale of 10,000 shares of the theretofore unissued common stock of Mengel to the defendant, Alvin A. Voit, was not an exercise of the option granted and approved by the stockholders of Mengel at the meeting held on or about January 22, 1945, for the reason that the terms of the option were that it could be properly exercised only by payment for said stock in cash prior to January 1, 1950.

16. Such purported sale of 10,000 shares of the theretofore unissued common stock of Mengel to the defendant, Alvin A. Voit, was not an exercise of the option granted

and approved by the stockholders of Mengel at the meeting held on or about January 22, 1945, for the reason that at no time prior to the said sale on or about October 26, 1949, did two-thirds of the stockholders of Mengel in any way authorize such sale or the terms thereof.

17. (a) The aforesaid 10,000 shares of the theretofore unissued common stock of Mengel have been issued by Mengel but are at the present time in the possession of Mengel which holds them as collateral security under the terms of the aforesaid sale.

(b) Since said sale the common stock of Mengel has sold on the New York Stock Exchange at a price as high as $21.50 per share.

(c) The annual dividend rate on the common stock of Mengel has been declared by the Board of Directors of Mengel to be $2.00 per share per annum.

(d) The effect of the terms of the said sale are to permit the defendant, Alvin A. Voit, to acquire 10,000 shares of the common stock of Mengel by the accumulation of the dividends thereon, without any expenditure therefor on his part, without any risk to him, and in effect, constitutes an unauthorized gift of corporate assets to him.

18. (a) The said sale of said 10,000 shares of the theretofore unissued common stock of Mengel to Alvin A. Voit violates the preemptive rights of the plaintiffs to the purchase of newly issued common stock of Mengel.

(b) Such sale has the effect of displacing the plaintiffs from their relative positions as stockholders in Mengel and dilutes their voting rights.

19. Unless enjoined by this Court, Mengel intends to transfer to the defendant, Alvin A. Voit, the said 10,000 shares of its theretofore unissued common stock in accordance with the terms of the said sale, and in the event such intention is put into effect, the plaintiffs and all other stockholders, who are similarly situated, will be irreparably damaged.

20. The stock of Mengel is actively traded in on the New York Stock Exchange and more than 500,000 shares are outstanding. These shares are held by thousands of stockholders widely scattered throughout the United States

and elsewhere, whose identity is subject to continuous change and it is, therefore, impracticable to bring all of such stockholders before the court. This action, brought representatively by the plaintiffs, is capable of protecting the rights of the similarly situated stockholders.

21. Plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs demand judgment:

1. In prohibiting the corporation from giving effect to the sale referred to herein, and from transferring said 10,000 shares of stock, or any part thereof, or any dividends becoming due thereon, to the defendant, Alvin A. Voit, or to anyone on his behalf.

2. Enjoining and prohibiting the defendant, Alvin A. Voit, from receiving or exercising any rights, in relation to the aforesaid 10,000 shares of common stock of Mengel.

3. Declaring the rights of the parties hereto, and granting such other relief as the court may deem just.

Israel Beckhardt,
Attorney for Plaintiffs,
Office & P. O. Address
18 East 41st Street,
Borough of Manhattan,
City of New York.

COMMONWEALTH OF MASSACHUSETTS }
COUNTY OF SUFFOLK } ss.:

Arthur Haffer and Hilda D. Haffer, being duly sworn, depose and say:

That they are the plaintiffs herein; that they have read the foregoing complaint and know the contents thereof, and that the same is true to their own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, they believe it to be true.

Arthur Haffer (sgnd)
Hilda M. Haffer (sgnd)

Sworn to before me this 13th day of March, 1951.

Jack J. Moss, Notary Public.

Notary Stamp and Seal.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Louisville
Civil Action No. 2228.

Ann F. Ames, - - - - - - - Plaintiff,

vs.

Alvin A. Voit,
Albert L. Entwistle,
Walter T. Green,
Dulaney Logan,
The Mengel Company,
Charles G. Middleton, and
Edward Lane, - - - - - - - Defendants.

MOTION—Filed October 25, 1951.

The defendant, The Mengel Company, moves the Court for an order requiring the plaintiff herein to give security for the reasonable expenses, including counsel fees, which may be incurred by it in connection with this action.

Counsel for The Mengel Company.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
Civil No. 2107.

Arthur Haffer and Hilda D. Haffer, suing on behalf of themselves and all other stockholders of The Mengel Company, similarly situated, - - - - - - - - - Plaintiffs,

v.

Alvin A. Voit and The Mengel Company, - Defendants.

ANSWER—Filed May 24, 1951.

FIRST DEFENSE.

1. The complaint fails to state a claim against the defendant, The Mengel Company (hereinafter called "Mengel"), upon which relief can be granted.

SECOND DEFENSE.

2. Defendant, Alvin A. Voit, has not been served with process, nor has he appeared in the action, and he is an indispensable party.

THIRD DEFENSE.

3. Plaintiffs' alleged claim is compensable in damages and the complaint fails to state facts justifying the granting of an injunction.

FOURTH DEFENSE.

4. The matter in controversy, exclusive of interest and costs, does not exceed the sum or value of $3000.

Answer

FIFTH DEFENSE.

5. Admits the allegations of paragraph 1 of the complaint, and states that as of this date the records of Mengel show that the plaintiff, Arthur Haffer, is the owner of 32 shares, and the plaintiff, Hilda D. Haffer, is the owner of 43 shares.

SIXTH DEFENSE.

6. Admits the allegations of paragraphs 2, 3, 4 and 5 of the complaint.

SEVENTH DEFENSE.

7. Denies the allegations of paragraph 6, because it contains a conclusion of law.

EIGHTH DEFENSE.

8. Denies the allegations of paragraph 7 of the complaint.

NINTH DEFENSE.

9. Denies the allegations of paragraph 8.

TENTH DEFENSE.

10. Admits the allegations of paragraph 9(a), except it denies that it was contemplated that the option would be exercised by cash payments upon the exercise thereof.

ELEVENTH DEFENSE.

11. Admits the allegations of paragraph 9(b) of the complaint, except that the affirmative vote was of more than two-thirds of the stock represented at the meeting and was not more than two-thirds of the stockholders.

TWELFTH DEFENSE.

12. Admits the allegations of paragraph 10 of the complaint.

THIRTEENTH DEFENSE.

13. Admits the allegations of paragraph 11 of the complaint, with the correction that the defendant, Voit,

actually purchased, instead of, as alleged, attempted to purchase, the 10,000 shares of the Common Stock of Mengel.

FOURTEENTH DEFENSE.

14. Denies the allegations of paragraph 12 of the complaint.

FIFTEENTH DEFENSE.

15. Denies the allegations of paragraph 13 of the complaint.

SIXTEENTH DEFENSE.

16. Denies the allegations of paragraph 14 of the complaint.

SEVENTEENTH DEFENSE.

17. Denies the allegations of paragraph 15 of the complaint.

EIGHTEENTH DEFENSE.

18. Denies the allegations of paragraph 16 of the complaint.

NINETEENTH DEFENSE.

19. Admits the allegations of paragraphs 17(a) and 17(b) of the complaint, but denies the allegations contained in paragraphs 17(c) and 17(d).

TWENTIETH DEFENSE.

20. Denies the allegations of the complaint contained in paragraphs 18(a) and 18(b).

TWENTY-FIRST DEFENSE.

21. Denies the allegations contained in paragraph 19 of the complaint.

TWENTY-SECOND DEFENSE.

22. Admits the allegations of paragraph 20 of the complaint, except that it denies that the plaintiffs represent other stockholders.

Answer

TWENTY-THIRD DEFENSE.

23. Defendant denies the allegations of paragraph 21 of the complaint.

TWENTY-FOURTH DEFENSE.

24. Defendant states that on January 22, 1945, the Chairman of the Board of Mengel, William B. Harrison, addressed a letter to all stockholders, in which the Board asked and recommended approval of an option to Alvin A. Voit covering 10,000 shares of the Common Stock of Mengel at the coming special stockholders meeting to be held on February 27, 1945; that the Board of Directors of Mengel had passed a resolution granting the option to Alvin A. Voit on May 19, 1944; that notice of the special meeting of stockholders to be held on February 27, 1945, notified the stockholders, among other things, that they were to take action on the option granted to Alvin A. Voit. A full description of the option was contained in the proxy statement to the stockholders, and a full copy of the resolution of the Board of Directors was also sent to the stockholders. Thereafter, at the special meeting of stockholders held as scheduled on February 27, 1945, the resolution of the Board of Directors granting Alvin A. Voit the option to purchase 10,000 shares of the Common Stock of the Company at any time and from time to time on or prior to December 31, 1949, at the price of $10. per share, and the resolutions of the Board of Directors with respect thereto were ratified and approved by the stockholders by a vote of 229,142 shares cast for the adoption of the resolution, and 36,385 shares voted against the resolution.

Reference is made to the letter of William B. Harrison, Chairman of the Board, dated January 22, 1945, and to the notice of the special meeting and the proxy statement sent to the stockholders for the special meeting to be held on February 27, 1945, and to the resolution of the stockholders adopted at the special meeting, approving the option as hereinabove set forth, copies being attached hereto as part hereof, for the true and exact contents thereof.

Answer

Defendants state that on October 26, 1949, Alvin A. Voit exercised said option by delivering to Mengel a demand promissory note dated October 26, 1949, for $100,000, executed by Alvin A. Voit, and bearing interest at the rate of three per cent per annum from date, payable semi-annually; that certificates for 10,000 shares of stock were issued in the name of Alvin A. Voit and delivered to him, and thereupon by him redelivered to Mengel, with powers of attorney for transfer duly executed by him, as security for the payment of said promissory note, it being provided in said note that the defendant might from time to time withdraw the collateral by making payments on the principal at the rate of $10.00 for each share withdrawn; that dividends on the shares held as security were to be applied first toward the payment of interest, and second toward the payment of principal; that Mengel should look solely to the 10,000 shares of stock pledged as collateral for the payment of said note. Defendants state that the manner of exercising said option was in accord with the resolution of the Board of Directors theretofore adopted by it and approved by the stockholders; that neither the resolution nor the approval by the stockholders provided that Alvin A. Voit should be required to pay cash for said stock at the time he exercised the option, but that cash was required only when Mengel finally released the stock to Alvin A. Voit.

Defendants state that on October 21, 1949, the Board of Directors of Mengel passed a resolution approving the method by which Alvin A. Voit exercised the option theretofore granted to him, and further states that on or about April 4, 1950, Mengel duly mailed to each of its stockholders of record on said date notice of the annual meeting of stockholders to be held on May 3, 1950, for the election of directors, the approval of the appointment of independent public accountants, and to consider and act upon such other business as might properly come before the meeting. Accompanying said notice was a proxy statement dated April 4, 1950, a copy being attached hereto, which provided in part as follows, giving to the stockholders exact information as to how Alvin A. Voit had exercised the option

granted to him by the Board of Directors with the approval of stockholders:

"(5)By action of the Board of Directors, approved by the stockholders of the Company on February 27, 1945, Mr. Voit was granted an option to purchase 10,000 shares of Common Stock of the Company at $10.00 per share. Mr. Voit exercised this option on October 26, 1949. On the date this option was exercised the highest price at which Common Stock of the Company was sold on the New York Stock Exchange was $10.25 per share. The purchase price of $100,000 for this stock is evidenced by a demand promissory note dated October 26, 1949, executed by Mr. Voit, bearing interest at the rate of 3% per annum from date, payable semi-annually. Certificates for these 10,000 shares of Common Stock have been issued in the name of Alvin A. Voit, but are held by the Company as security for the payment of the promissory note, above mentioned, it being provided in said promissory note that the Company shall look solely to the 10,000 shares of stock pledged as collateral for the payment of this note. The largest aggregate amount of indebtedness outstanding from Mr. Voit to the Company at any time during 1949 was $100,000, being the promissory note above mentioned. As of March 15, 1950, the aforesaid promissory note was outstanding."

Said annual meeting was duly held, pursuant to said notice, on May 3, 1950, and at said meeting there was no legal objection to the resolution of the Board of Directors of October 21, 1949, authorizing the issuance of said 10,000 shares of stock to Alvin A. Voit as described in the complaint, or to the manner of the exercise of the defendant, Voit, of the option granted to him. At said meeting of stockholders approximately 75 per cent of the stock of Mengel was represented and voted favorably for the Management and the re-election of the Board of Directors offered to the meeting by the Management.

The plaintiffs herein, although having received due notice of the meeting of stockholders, together with a proxy statement containing full information in regard to the option, did not attend said annual meeting nor did they send in a proxy for anyone to represent them, nor did

anyone representing them attend said meeting, or make any motion or any legal objection to the exercise of said option.

Accordingly defendants state that the plaintiff herein and all stockholders whom she may represent or claim to represent acquiesced in, ratified and confirmed said resolution of the Board of Directors on October 21, 1949, and the exercise by Alvin A. Voit of said option on October 26, 1949, and the manner thereof, and are now estopped to assert that said resolution of said exercise of the option was illegal or improper.

Defendants state that at the 1951 annual meeting, held on May 2, 1951, eighty per cent of the stock of the Company was represented at the meeting, being the largest percentage of representation ever had at any annual meeting of Mengel. Defendant states that, although the attention of the stockholders had again been called to the Voit option and the method of its exercise in the proxy statement sent to all the stockholders of Mengel, there was no objection raised at the stockholders meeting, and again the stockholders voted unanimously in favor of the Management and for the re-election of the entire Board of Directors offered to the meeting by the Management.

TWENTY-FIFTH DEFENSE.

25. Defendant states that Mengel is a New Jersey corporation, having its principal place of business at Louisville, Kentucky, and states that the matters alleged in the complaint relate to the internal government and affairs of a New Jersey corporation and are to be determined by the laws of New Jersey, under which the internal affairs of a corporation, in the absence of fraud, are left entirely to the officers and directors of the corporation.

Wherefore, the defendants pray to be hence dismissed, for its costs herein expended and all proper relief.

Chas. G. Middleton,
Louis Seelbach,
Leo T. Wolford,
Edwin G. Middleton,
501 South Second Street,
Louisville, Ky.,
Attorneys for Defendants.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Louisville
Civil Action No. 2228

Ann F. Ames, - - - - - - - - - Plaintiff,

vs.

Alvin A. Voit,
Albert L. Entwistle,
Walter T. Green,
Dulaney Logan,
The Mengel Company,
Charles G. Middleton, and
Edward Lane, - - - - - - - - Defendants.

AFFIDAVIT OF CLARENCE O. MELOY IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS AND TO STAY PROCEEDINGS—Filed October 25, 1951.

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } ss.

Clarence O. Meloy, being duly sworn, states as follows:

I am Secretary of the defendant, The Mengel Company.

The Mengel Company is a New Jersey corporation which has its principal place of business at Fourth and Colorado Streets in Louisville, Kentucky.

As appears from the records of The Mengel Company, the plaintiff, Ann F. Ames, became the holder of record of 50 shares of the common capital stock of The Mengel Company on March 9, 1949, and a certificate for such stock was issued to her on that date. The total amount of the common capital stock of the Company at that time was 560,379 shares, and the amount of the outstanding common capital stock at the time this action was commenced was

590,101 shares. Accordingly, the action is instituted and maintained by a holder of less than 5% of the outstanding shares of the common capital stock of The Mengel Company and the shares of stock standing in the name of the plaintiff do not have a market value in excess of $50,000 or in excess of $1,000. The stock standing in the name of the Plaintiff was less than 1% of 1% of the outstanding common capital stock of the Company.

The incentive plan approved by resolution of the Board of Directors on May 19, 1944, with the approval of more than two-thirds of the stockholders present at a meeting on February 27, 1945, gave to the defendant, Alvin A. Voit, an option to purchase 10,000 shares of the common capital stock of the corporation at $10.00 per share. The defendant Voit exercised the said option on October 26, 1949, pursuant to a resolution of the Board of Directors on October 21, 1949.

On the date the Certificates for the 10,000 shares of stock were issued to the defendant Voit, the highest price at which the said stock sold on the New York Stock Exchange was $10.25 a share. Taking the highest price for that day, the profit which the defendant Voit realized upon the purchase of said shares was, therefore, 25 cents a share. Since the plaintiff held 50 shares out of approximately 570,000 shares outstanding, the pre-emptive right of the plaintiff, if any, to purchase new shares, would have been the right to purchase 50/57th of a share, which at the profit realized by the defendant Voit would have amounted to 22 cents. The plaintiff's individual damage is, therefore, 22 cents at the most.

The Mengel Company suffered no damage by accepting in payment of the 10,000 shares of its common capital stock the $100,000 promissory note of Alvin A. Voit, without personal liability, bearing 3% interest from date and secured by the certificate for the 10,000 shares of its common capital stock issued in the name of Alvin A. Voit and endorsed in blank by him and the income therefrom, which certificate is in the possession of The Mengel Company, because if the note is ultimately paid with interest the Company will have received full payment for the stock ac-

cording to the plan authorized by the resolution of the Board of Directors and approved by the stockholders; and if the note is not paid with interest, the Company will be restored to its original position as if no sale had been made. The purpose of the incentive plan was to cement the relations between the Company and Alvin A. Voit because of the peculiar dependence which the Company has upon his knowledge of the business and his managerial ability by giving him a substantial interest in the Company at a fair price and without such personal obligation so that he would have no personal financial concern and would be able to devote his entire energy and concern to the Company's welfare.

The plaintiff on or about December 12, 1950, instituted a suit to recover her alleged pre-emptive rights on the issuance of such stock, by action in the Supreme Court of the State of New York, styled Ann F. Ames against Alvin A. Voit and The Mengel Company. The said suit was removed to the United States District Court for the Southern District of New York, and the defendant, The Mengel Company, moved the Court to require the plaintiff to give a bond to secure it for costs and expenses therein, and such proceedings were had therein, and on appeal to the United States Court of Appeals for the Second Circuit (Ames vs. Mengel Co., 190 F. 2d 344), that such suit was dismissed for lack of jurisdiction. The entire proceedings in such earlier suit are incorporated herein by reference as if copied herein.

In such prior action, as show by certified transcript from the Clerk of the United States District Court for the Southern District of New York, Second Division, the plaintiff did not pay costs of $115.50 taxed against her in such action.

On or about March 19, 1951, Arthur Haffer and Hilda D. Haffer, purporting to sue on behalf of themselves and all other stockholders of The Mengel Company brought their suit in the United States District Court for the Southern District of New York against Alvin A. Voit and The Mengel Company complaining of the same matters which

are complianed of in the complaint herein, and such proceedings were had that the said suit was transferred by order of the United States District Court for the Southern District of New York to the United States District Court for the Western District of Kentucky, pursuant to 28 U.S.C. §1404(a) and such suit is now pending in this Court styled Arthur Haffer, etc. vs. Alvin A. Voit, etc., Civil Action No. 2107. The said suit is incorporated by reference herein as fully as if copied herein.

(s) Clarence O. Meloy.

Subscribed and sworn to before me by Clarence O. Meloy this 25th day of October, 1951.

My commission expires

Notary Public, Jefferson County, Kentucky.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Louisville
Civil Action No. 2228

Ann F. Ames, - - - - - - - Plaintiff,

v.

Alvin A. Voit,
Albert L. Entwistle,
Walter T. Green,
Dulaney Logan,
The Mengel Company,
Charles G. Middleton, and
Edward Lane, - - - - - - - Defendants.

AFFIDAVIT OF CHAS G. MIDDLETON
—Filed January 22, 1952.

Chas G. Middleton, being duly sworn, states that he is a member of the law firm of Middleton, Seelbach, Wolford, Willis & Cochran, General Counsel for the defendant, The Mengel Company. Affiant states that the said firm or its predecessor firms have been General Counsel or General Attorneys for the defendant, Mengel, for approximately thirty-six years. Affiant states that during all of said time he has been called upon to do most of the legal work of the defendant, The Mengel Company. Affiant states that he has been a Director of Mengel since 1946, and is the owner of 1000 shares of the Common Stock of said Company in his own right.

Affiant states that he was consulted by the Board of Directors of Mengel in 1944, at the time the Board passed the resolution of May 19 of that year, by the terms of which, and subject to stockholder approval, the Board granted an option to Alvin A. Voit, President, to purchase 10,000

shares of the Common Stock of the Company. Affiant states that the Board well knew at the time that Voit was not in a position to pay cash for said stock, which was selling at the time at approximately $10.00 a share, and affiant states that neither the Board nor Voit contemplated that Voit would be able out of his own funds to pay $10.00 cash per share for the stock. The Board, however, deemed it essential that Mr. Voit be tied in more closely with the Company, thinking that the future of the Company depended substantially upon Mr. Voit's efforts in its behalf. Affiant states that the Board thereafter called a meeting of the Common Stockholders of the Company, to be held on the 27th day of February, 1945, to take action on the Board's resolution granting Alvin A. Voit the option. Affiant states that said meeting was held on the 27th day of February, 1945, and the stockholders approved the option granted by the Board to Alvin A. Voit on May 19, 1944.

The following is an excerpt from the minutes of the stockholders meeting held on February 27, 1945, at which meeting the option was approved by the stockholders:

"The Secretary then presented and read to the meeting the resolutions of the Board of Directors adopted at their meeting of May 19, 1944 and December 27, 1944 relating to the granting of an option to Alvin A. Voit, President, to purchase 10,000 shares of the $1.00 Common Stock of the Company.

"Ample opportunity was given for a full and complete discussion of the option and the resolutions pertaining thereto adopted by the Board of Directors, at the close of which the following resolution was duly presented:

"RESOLVED

"That an option be granted to Mr. Alvin A. Voit, President of the Company, to purchase 10,000 shares of the unissued $1.00 par value Common Stock of The Mengel Company, or any part thereof, at any time, and from time to time, on or prior to December 31, 1949, at the price of $10.00 per share, and that the resolutions of the Board of Directors with respect thereto

adopted at the regular meeting held May 19, 1944, be ratified and approved; provided, however, that no part of this option may be exercised unless Mr. Voit is still in the employ of the Company, and until it is approved by the proper governmental authorities.

"Said resolution was duly seconded.

"Thereupon, on motion duly made, seconded and unanimously carried, it was determined that the voting upon the aforesaid resolutions should be by ballot. The Chairman thereupon announced that the polls were now open and that the inspectors were prepared to receive the ballots of the stockholders. After all the stockholders present in person or by proxy had cast their ballots, the Inspectors retired to count the ballots. After concluding their duties, the Inspectors presented their report in writing, and it was ordered that the original report be filed with the Secretary and that a copy thereof be spread upon the minutes of this meeting.

"The following is a copy of the report of the Inspectors:

"State of Kentucky }
County of Jefferson } ss

"We, the undersigned Inspectors, having been duly appointed by the stockholders to act as Inspectors at a special meeting of the stockholders of The Mengel Company, held on the 27th day of February, 1945 at the office of the Company, 1122 Dumesnil Street, Louisville, Kentucky, and having taken an oath to perform faithfully, honestly and impartially the duties of such Inspectors, do report as follows:

"Upon the resolutions made and seconded for the adoption and approval of the Mengel Savings and Retirement Plan and for ratifying and approving the resolutions adopted by the Board of Directors at a meeting held December 27, 1944, with respect to said Retirement Plan:

Affidavit of Chas. G. Middleton

"248,958 shares of the Common Stock were cast FOR.

"16,569 shares of the Common Stock were cast AGAINST.

"Upon the resolution made and seconded for the granting of a stock option to Mr. Alvin A. Voit to purchase 10,000 shares of the unissued $1.00 par value Common Stock of The Mengel Company, or any part thereof, at any time, and from time to time, on or prior to December 31, 1949, at the price of $10.00 per share, and for the ratification and approval of the resolutions adopted by the Board of Directors at a meeting held May 19, 1944 with respect to said option:

"229,142 shares of the Common Stock were cast FOR.

"36,385 shares of the Common stock were cast AGAINST.

"Dated, February 27, 1945.

(s) John M. Ehret
(s) Edward F. Buckler

"On motion duly made, seconded and unanimously carried, the report of the Inspectors was approved and ordered filed with the Secretary.

"The Chairman thereupon declared that the Mengel Savings and Retirement Plan was duly adopted and is now operative, subject to the approval of the Treasury Department, and that the option to purchase 10,000 shares of the Common Stock of the Company was ratified and approved by action of the stockholders of the Company, subject to the approval of the proper governmental authorities."

Affiant states that the option extended over a period from February 27, 1945, to December 31, 1949—almost five years Affiant states, therefore, that the stockholders did not attempt to specify in their resolution exactly how Alvin A. Voit was to exercise his option in the event he decided to do so, but that matter was left in the discretion of the Board of Directors, upon the sole condition that

before the defendant, The Mengel Company, released the stock it would receive $10.00 per share in cash. The option did not specify that Alvin A. Voit was to provide the cash from his own resources. Indeed, the Board, in passing the resolution and granting the option, knew that Alvin A. Voit was not in a position to provide the necessary cash and that was the reason the option itself provided as follows:

"There are no restrictions against the sale of the shares purchased or the assignment of the option under the option agreement."

It was contemplated under the option that Alvin A. Voit might sell part of the option stock and pay for the balance. The Board and the stockholders did not want Alvin A. Voit to be harassed by personal financial worries over how to pay for the stock. Indeed, that was one of the objects to be accomplished by the option, a relief to Voit from personal financial worries, so that his best efforts could be used for the benefit of the Company and its stockholders. Under the option as granted and exercised, The Mengel Company at no time released the stock from its own control and possession until and unless it received $10.00 in cash per share, either from the sale of some of the shares, or from dividends, or from any surplus funds that Alvin A. Voit might have to invest in the stock.

It is not true as stated in the affidavit of the attorney for the plaintiff that "Mengel, Voit and the stockholders obviously understood that the option would only be exercised by Voit by payment in cash." The Mengel Company, Voit, the Board of Directors and the stockholders all knew that Voit did not have the cash to pay for the shares of stock. Accordingly the Board of Directors in full compliance with the resolution passed at the stockholders meeting on February 27, 1945, took the following action at a Board meeting on October 21, 1949:

"Mr. Boynton reported on discussions which he and several other members of the Board had had with Mr. Voit relative to the exercise of the stock option granted to Mr. Voit by the Board of Directors on May 19, 1944, and approved by the stockholders on February 27, 1945.

"Thereupon, and after full discussion, the following resolution, being duly offered and seconded, was unanimously adopted:

"RESOLVED:

"(A) That the Board of Directors of The Mengel Company does hereby authorize the issuance to Alvin A. Voit, its President, certificates evidencing the ownership of 10,000 shares of the Common Stock of The Mengel Company upon receipt by the Treasurer of the Company from Mr. Voit of a demand note in the amount of $100,000 in form approved by the General Counsel of the Company, said note to contain the following terms and conditions:

"(1) Interest at the rate of three percent per annum, payable semi-annually, from date on the amounts from time to time remaining unpaid.

"(2) The note to be secured by deposit with the Treasurer of the Company of the 10,000 shares of Common Stock, accompanied by stock powers signed in blank in the usual form and to be approved by the General Counsel of the Company.

"(3) Mr. Voit to have the privilege of acquiring and receiving shares from time to time by payments on the principal of the note at the rate of $10.00 cash (the option price) for each share of stock so acquired and received, the market price of the stock being $9.25 per share as of this date.

"(4) Dividends declared and paid on shares held as security for the note as hereinabove set forth are to be applied first towards the payment of interest, and second towards the payment of the principal of the note.

"(5) The Company to have no recourse against the maker of the note, except to the extent of the stock deposited as collateral security therefor.

"(B) (i) Further that the Treasurer and other officers of the Company are authorized to do all things necessary, proper and legal to make the foregoing resolution effective.

"(ii) That the Guaranty Trust Company of New York, New York, New York, as Transfer Agent, and the Bankers Trust Company, Registrar, New York, New York, be and they hereby are directed to issue 10,000 shares of Common Stock to Alvin A. Voit upon receipt of notice from C. O. Meloy, Treasurer of The Mengel Company, that Alvin A. Voit has executed and delivered to him the note for $100,000 hereinbefore mentioned and the stock powers hereinabove described, and upon receipt from C. O. Meloy, Treasurer, an opinion of counsel for the Company that the issuance of said stock under the circumstances hereinabove described is legal.

"(iii) The Guaranty Trust Company is authorized to send such certificates by Registered Mail after the same have been issued to C. O. Meloy, Treasurer of the Company.

'(iv) That C. O. Meloy, Treasurer, is directed to place said certificates, together with the stock powers and the note, in the box of The Mengel Company in the vault of The Kentucky Trust Company, Louisville, Kentucky, which box is to be opened only in accordance with resolutions already adopted by the Board of Directors and already on the records of the Company."

Affiant states that under the foregoing resolution The Mengel Company is fully protected in that it has in its possession Alvin A. Voit's promissory note, payable on demand and bearing three percent interest, which note it has treated as one of the Company's assets, holding the 10,000 shares of stock, all endorsed in blank, as collateral for the payment of the note, so that no stock will be released to Voit's possession and control unless and until the Company receives $10.00 in cash for each share, which is in exact accordance with the resolution and the option therto-

fore approved by the Board of Directors and the stockholders.

Affiant states that in the proxy statement dated April 4, 1950, for the annual meeting of stockholders to be held on May 3, 1950, exact information was given to the stockholders as to how Alvin A. Voit had exercised the option granted to him by the Board of Directors, with the approval of the stockholders.

A copy of said proxy statement is attached hereto.

Affiant states that said annual meeting was duly held on May 3, 1950, and at said meeting there was no legal objection to the resolution of the Board of Directors adopted at its meeting of October 21, 1949, authorizing the issuance of said 10,000 shares of stock to Voit, as described in the complaint, or to the manner of exercise of said option. At said meeting of stockholders approximately 75 percent of the stock of Mengel was represented and voted favorably for the management and reelection of the Board of Directors offered to the meeting by the management, with full knowledge given them in the proxy statement as to how the option had been exercised.

Affiant states that the plaintiff herein, although having received due notice of the meeting of stockholders, together with the proxy statement containing full information in regard to the option, did not attend said annual meeting, nor did she send in a proxy for anyone to represent her, nor did anyone representing her attend said meeting or make any mention or legal objection to the method of exercising said option. Accordingly, affiant states that the plaintiff herein and all stockholders whom she may represent or claim to represent acquiesced, ratified and confirmed said resolution of the Board of Directors adopted on October 21, 1949, and the exercise by Alvin A. Voit of his option on October 26, 1949, and the manner thereof, and are now estopped to assert that said resolution or said exercise of the option was illegal or improper.

Affiant states that at the 1951 annual meeting, held on May 2, 1951, 80 percent of the stock of Mengel was represented at the meeting, being the largest percentage representation ever had at any Mengel annual meeting. Affiant

states that, although the attention of stockholders, including the plaintiff, had again been called to the Voit option and the method of its exercise in the proxy statement, the plaintiff raised no objection at said meeting, and again the stockholders voted unanimously in favor of the management and the reelection of the Board of Directors offered to the meeting by the management.

Affiant states that it is true that the Listing Application on the New York Stock Exchange contained the quotation as set forth on page 3 of the plaintiff's attorney's affidavit. Affiant states, however, that said application was carelessly drawn and said listing application should have stated, not that $10.00 per share in cash should have been received upon the exercise of the option, but that the cash should be received at or before the time the stock was finally delivered to Alvin A. Voit.

Affiant states that the attorney for plaintiff in his affidavit seems to assume that each year Alvin A. Voit will be credited with $20,000 in dividends. Affiant states, however, that the assumption, in view of Mengel's past record in earning and declaring dividends, is not justified. Accordingly, the affidavit of plaintiff's attorney concludes that Alvin A. Voit will receive the entire 10,000 shares of stock without having invested a single penny and without having subjected himself to any financial risk. Plaintiff's attorney's affidavit overlooks the fact that Mengel may not pay any dividend in some years, in which event Alvin A. Voit will have to pay the interest on his note from his own pocket, which is indeed what happened in the year 1949, during which year Alvin A. Voit was called upon to pay an installment of interest before Mengel had declared any dividend.

Attached hereto is Mengel's dividend record from the year 1932 to the year 1951, inclusive.

Also attached hereto is the affidavit of C. O. Meloy, Secretary and Treasurer, as to the payment of interest by Alvin A. Voit in the year 1949, before any dividend was declared or paid on the stock.

Also the charge that Alvin A. Voit will receive the shares of stock without subjecting himself to financial risk

is exactly what the Board and the stockholders intended to be the case. They did not want Voit to be worried by personal financial risks and wanted his undivided efforts given to the successful operation of Mengel. That was one of the things to be accomplished by the liberal terms of the option.

That the Board was amply justified in offering Voit the additional incentive is shown by the results of Mengel's operations under Voit's direction, all of which will be set forth in more detail in this affidavit.

Affiant states that it is not true as stated in the affidavit of counsel for plaintiff that the only assent the stockholders gave for the issuance of 10,000 shares of stock was a conditional one, under which they authorized the issuance of the stock by payment in cash therefor in the sum of $100,000. This affiant states that neither in the resolution passed by the Board nor the resolution of approval adopted by the stockholders was it provided that Voit should pay for the stock in cash, because, as already stated, all concerned knew that Voit did not have the cash to pay. Accordingly, neither the resolution of the Board, adopted in May of 1944 and approved by the stockholders on February 27, 1945, specified how the payment for the stock was to be made. That matter was left entirely to the discretion of the Board of Directors in office at the time the option was taken up. As the option extended over a period of five years, this was the only practical way the matter could have been handled. The only condition was that the Company should receive $10.00 in cash for each share of stock before it was actually released from the custody of the Company. Neither the Company nor the stockholders could possibly have been hurt by such arrangement, because, if the stock went up, the Company could call the note, sell the stock and receive $10.00 a share for each share sold. On the other hand, if the stock went down and the Company wanted to call the note, it could do so and recover the stock itself; so that, in neither event would the Company or the stockholders be the loser. In fact, nowhere does the affidavit for plaintiff's attorney in support of his motion for summary judgment show that there has or will

be any damage to the Company, the very basis of a derivative action, nor can he do so. The gravaman of his complaint is a violation of preemptive rights of the stockholders and the only indication in his affidavit that the action is derivative in nature is contained in the second literary paragraph of the said affidavit wherein he attempts to make the cause of action derivative in nature by simply calling the action derivative. In all other respects the affidavit in support of plaintiff's motion for summary judgment in his so-called "derivative action" before this court is identical with the affidavit filed in support of his motion for summary judgment in his admittedly preemptive right cause of action dismissed by the U. S. Court of Appeals for the Second Circuit for want of jurisdiction.

The option was never intended to be taken up in cash, because the Company wanted to give Voit a real incentive. There was no incentive if he had to pay in cash the market price for the stock, because he could have bought the stock under those conditions on the open market without any option or incentive from the Company.

No preemptive rights of the plaintiff were violated, because the stockholders by more than a two-thirds vote in effect set aside 10,000 shares of its Common Stock for Voit, provided the Company received $10.00 per share therefor. Therefore, the preemptive rights of all stockholders were waived insofar as said 10,000 shares were concerned. Accordingly, if the Company receives $10.00 in cash at the time it releases the shares, as it will under the plan adopted, no stockholder's preemptive rights will have been violated.

Plaintiff has never at any time requested to be permitted to subscribe to shares at the price at which the option was given to Mr. Voit.

The resolutions did not provide that the $10.00 in cash should be received by the Company at any particular time. They provided only that, before the stock was finally released from the control of the Company, it receive $10.00 in cash for each share. Plaintiff seems to assume that the resolutions provided for in the payment of $10.00 in cash prior to December 31, 1949, but the resolutions do not so provide. The option was satisfied and is satisfied if the

Company gets $10.00 in cash before the stock is turned over unequivocally to Voit.

At the time the option was granted, as hereinabove indicated, the market value of the stock was about the same as the option price, and so the plaintiff, in truth and in fact, in complaining about the preemptive rights on her 50 shares, any rights she might have asserted would have amounted to some few cents, almost in the de minimis class.

In plaintiff's attorney's affidavit he calls the Court's attention to Sections of the New Jersey Statutes, Annotated, as follows:

14:8-17, 14:11-1, 14:11-2 and 14:8-9, all of which Sections come under Chapter 11, relating to "Amendments, Changes or Alterations in Charters." Plaintiff's attorney does not call attention to Chapter 9, "Beneficial Provisions for Employees," Sections 14:9-1a, 14:9-1b and 14:9-3, all of which Sections relate to the case at bar and provide in effect that a Company may aid employees in paying for stock by contributions, compensation for services, "or otherwise." Under said Sections the Board of Directors has a broad discretion to aid in stock participation by employees if it is deemed in the interest of the Company so to do. In the absence of an unreasonable plan or a fraudulent plan, neither one of which is present in the case at bar, the judgment of the Directors and the vote of the stockholders make the plan final and unassailable. Said Section also provides that the participation by all or any of the employees may be based upon length or nature of service, or upon such other basis as may be selected for the purpose, "and may be in cash or by the delivery of shares of its capital stock held by it, or issued or purchased by it for the purpose."

Under said Section, The Mengel Company, had it deemed it advisable so to do, might have purchased its shares on the open market, and in a proper case issued the same as part of a profit-participation plan. Instead of doing that, the Voit option provided that the Company should receive $10.00 in cash before it finally released the shares of stock.

In the affidavit of plaintiff's attorney attention is not called to Section 14:9-3, relating to rights of dissenting stockholders.

Nor is attention called to Section 14:9-5, which in effect provides that the powers granted to corporations under Chapter 9, headed "Beneficial Provisions for Employees," are in addition to and independent of all powers and authority conferred by any other law and not in restriction or limitation of any of the powers of corporations of this State. This is a recognition of the broad principle of corporate law that it is a responsibility of Directors to employ proper management personnel and in the discharge of that duty it becomes necessary for Directors to fix and determine compensation, either in cash, stock or otherwise, and the decision of Directors, in the absence of fraud or unreasonable compensation, is final.

Furthermore, in the affidavit of plaintiff's attorney attention is called only to Judge Leibell's opinion in the United States District Court for the Southern District of New York. The final disposition of the case before Judges Hand, Chase and Frank and the opinion of Judge Chase in the U. S. Court of Appeals for the Second Circuit is overlooked.

Affiant further states that Alvin A. Voit entered the employ of Mengel on November 16, 1911, at the age of seventeen years. He was employed as mail clerk, or office boy, at $25.00 a month. In 1913 he was made assistant paymaster. In 1915 he was made paymaster. In 1917 he was advanced to customers account bookkeeper. In 1918 he left the employ of the Company to enter military service, was wounded overseas, and returned to the Company upon his discharge, in July of 1919, as assistant to the Treasurer. He was then made Assistant Treasurer, and in 1931 was made a Director. In 1937 he was made a Vice President, and in 1938 was also made Secretary and Treasurer. In June of 1939 he was made Executive Vice President, and in December of 1939 was elected President.

At the time Alvin A. Voit was elected President, he fully realized the responsibilities he was assuming in trying to improve conditions in Mengel. The stock at that time was selling at $3.00 per share, and the total sales were only $8,935,785. It was realized by all that, in view of the tax situation, accumulations or savings by Alvin A. Voit from

a salary could not be substantial, and some form of stock option was discussed by Voit and the Directors, but nothing positive was done about it until 1944, as hereinabove set forth, at which time the Board adopted the option plan of which the plaintiff complains. The object of the Board was to give Voit an incentive under which, if he did well with The Mengel Company, he would be rewarded, and, if he did not do well, he would get nothing. Under the plan it was impossible for Mengel itself to lose money, as hereinabove set forth.

Attached hereto is a record of Mengel sales and earnings per share and also the price range of the stock since Voit became the President. It is a record of outstanding accomplishment and justifies the confidence which the Board placed in Alvin A. Voit. Furthermore, it is generally recognized throughout financial circles both locally and in New York that Alvin A. Voit is and has been the prime mover and key man of the Company.

Attached hereto is the Mengel annual report for the year 1950. The annual report for 1951 is not in final form but earnings for the year were just under $3.00 per share of Common Stock.

The following is a comment on Mengel's annual report for 1950 from a Vice President of one of the large New York banks which has acted in various financial capacities for Mengel:

> "It is a most interesting historical record and a very self effacing presentation by the author of the facts about the man who is responsible for the present fine position of the company. I certainly hope all other readers are as knowledgeable as I as to who it is that gave Mengel a definite goal toward which so much progress is being made.
>
> "My sincere congratulations on a job well done and my very best wishes for continuing and increasing success."

Affiant states, therefore, that apparently the bankers, as well as the Board of Directors of Mengel, recognize who is responsible for Mengel's prosperity.

Affidavit of Chas. G. Middleton

From the annual report it will be seen what substantial changes Mengel has made in the products which it has made and sold over the past twelve years, under Alvin A. Voit's presidency. Mengel has been a problem company, in that products for which it had planned capacity, such as wooden boxes, wooden parts for automobiles, etc., have been outmoded by changes in economic conditions over which Mengel had no control, and Voit has been able to find profitable new products for the Company including, in the last few years, Mengel Permanized Furniture, which is now being sold on a nationally advertised basis.

Affiant states that in the year 1946 the market on Mengel stock went to $35½ per share, at which time Voit could have sold his option stock. However, at that time, the Treasury Department had not ruled upon the amount of taxes which Voit might have had to pay on the profits made. Had Voit wished to do so, however, he could have sold his option stock, and, if the Treasury Department held against him on the tax question, used the profits made in selling the stock to pay the taxes, but, had he done so, he would have retained a very small part of the 10,000 shares, and the purposes sought to be accomplished by the option, that is to say, to enable Voit to own a substantial number of shares in his own right, would have been defeated. So Voit, looking to the Company's purpose in granting the option rather than his own personal interest, refused to sell the stock, and subsequently, by the time the ruling was obtained from the Treasury Department, the market had declined, in 1949 the price range being from $7⅜ to $13⅝ per share.

Affiant states that in the year 1949, which was a bad year, Voit, over the protest of the Board of Directors, voluntarily reduced his salary 55 percent.

(s) Charles G. Middleton.

Affidavit of Chas. G. Middleton

State of Kentucky }
County of Jefferson } ss.

Subscribed and sworn to before me this 18th day of Jan., 1952.

My commission expires .....

.....
Notary Public, Jefferson Co., Ky.

January ..., 1952

Copy Received:

.....
Attorney for Plaintiffs.

THE MENGEL COMPANY

NET SALES, EARNINGS PER COMMON SHARE, AND RANGE OF PRICES ON COMMON SHARES —1939 to 1950, INCLUSIVE

Year	Sales	Earnings per share, Common	Price Range of Stock	
1939	$ 8,935,785	Deficit (.32)	3	5⅝
1940	10,813,095	.64	2½	6⅛
1941	18,702,004	2.57	3¼	6⅛
1942	23,343,332	1.45	4⅜	6
1943	27,723,595	1.40	4⅝	12¼
1944	25,060,157	1.72	8⅛	16¼
1945	25,117,582	1.66	14¼	29⅝
1946	25,341,617	2.91	18	35½
1947	35,291,685	3.95	16	24⅝
1948	35,629,610	3.12	11⅛	19⅞
1949	26,431,102	Deficit (.44)	7⅜	13⅝
1950	42,477,760	4.66	10⅛	17¼

Affidavit of Chas. G. Middleton

RECORDS OF DIVIDENDS PAID, BY YEARS, ON MENGEL $1 PAR COMMON STOCK, FROM 1932* TO MARCH 20, 1951

Year	Dividends paid per share
1932	None
1933	"
1934	"
1935	"
1936	"
1937	"
1938	"
1939	"
1940	"
1941	$0.50
1942	0.25
1943	0.25
1944	0.40
1945	0.30
1946	0.60
1947	1.45
1948	1.25
1949	0.75
1950	1.05
1951	1.75

*1932 was year this class of stock was created.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Louisville
Civil Action No. 2228

Ann F. Ames, - - - - - - - Plaintiff,

v.

Alvin A. Voit,
Albert L. Entwistle,
Walter T. Green,
Dulaney Logan,
The Mengel Company,
Charles G. Middleton, and
Edward Lane, - - - - - - - Defendants.

AFFIDAVIT OF C. O. MELOY, SECRETARY AND TREASURER OF THE MENGEL COMPANY—Filed January 22, 1952.

I, C. O. MELOY, being duly sworn state

That I am the duly elected and acting Secretary and Treasurer of The Mengel Company;

That as such officer I have responsibility for the custody of a certain note dated October 26, 1949, signed by Alvin A. Voit, payable to The Mengel Company, originally in the face amount of $100,000, together with the collateral applicable thereto;

That the note provides for the payment of interest at the rate of 3 percent per annum from date, payable semi-annually until paid;

That I have knowledge of all payments on account of principal or interest made with respect to such note;

Affidavit of C. O. Meloy

That on or about the last day of the year 1949 Mr. Voit paid to the Company, by his personal check, $543.96 interest on $100,000 from October 26, 1949, to December 31, 1949;

That the first dividend paid by The Mengel Company on its common stock after October 26, 1949, was paid on April 20, 1950.

(s) C. O. Meloy.

Subscribed and Sworn to before me on the 18th day of Jan., 1952, by C. O. Meloy, personally known by me to be Secretary and Treasurer of The Mengel Company.

.....
Notary Public,
Jefferson County, Kentucky.

My commission expires .....

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Louisville
Civil Action No. 2107.

Arthur and Hilda D. Haffer, et al., - - Plaintiffs,

v.

Alvin A. Voit and
The Mengel Company, - - - - Defendants.

Civil Action No. 2228.

Ann F. Ames, - - - - - - - - Plaintiff,

v.

Alvin A. Voit, et al., and
The Mengel Company, - - - - Defendants.

SUPPLEMENTAL AFFIDAVIT OF C. O. MELOY, SECRETARY OF THE MENGEL COMPANY—Filed September 23, 1953.

C. O. Meloy, being duly sworn, states that he is now and was at all times mentioned Secretary of The Mengel Company.

He states that the stock records of Mengel show that the plaintiff, Ann F. Ames, became a holder of record of Mengel Common Stock on March 9, 1949, when a certificate was issued to her for 50 shares. Affiant states that the records further show that this certificate was surrendered on January 9, 1953, and since said date Ann F. Ames has not been a stockholder of record of Mengel.

Affiant states that during two consecutive weeks, ending with the week during which the aforementioned certificate for 50 shares was issued on March 9, 1949, prices for Mengel

Affidavit of C. O. Meloy

Affiant further states that Articles XI and XII of the By-Laws of the Company are as follows:

"ARTICLE XI

Capital Stock

The Company shall not increase its capital stock unless thereunto authorized by a vote and the written assent of two-thirds in interest of the stockholders."

"ARTICLE XII

Amendments

These By-Laws may be altered, amended or repealed by the Board of Directors by vote of a majority of all the Directors, and without the consent or vote of the stockholders."

(s) C. O. Meloy.

Subscribed and sworn to by C. O. Meloy this 27th day of January, 1954.

My commission expires ——————————.

——————————

Notary Public, Jefferson Co., Ky.

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IN THE

Supreme Court of the United States

October Term, 1954.

ANN F. AMES, - - - - - - *Petitioner,*

v.

THE MENGEL COMPANY, ET AL., - *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

The petition sets forth no ground for the granting of the requested writ. It is only a repetition of the arguments unsuccessfully made in the courts below.

STATUTES INVOLVED.

The General Corporation Act of New Jersey headed "Beneficial Provisions for Employees" (14:9-1) provides that in New Jersey, corporations may adopt a plan for the issue or sale of shares of stock to employees, to be paid for "in installments or at one time," and "for aiding such employees * * * by contri-

butions, compensation for services or otherwise" (App. 1a).

The statute authorized the Directors to formulate such a plan by resolution and submit it to a meeting of the shareholders for action thereon (14:9-2).

As originally enacted, the statute provided that:

> "Any plan so adopted may be recalled, abolished, revised, amended, altered or changed in the same manner as herein provided for its adoption * * *" (14:9-4).

In 1948, in recognization of the fact that the carrying out of such a plan commonly requires some revision or amendment, the Legislature changed 14:9-4, by providing that any plan so adopted may be *recalled or abolished* in the same manner as provided for its adoption that is to say by a two-third vote of the stockholders, but that:

> "Any plan heretofore adopted or which may hereafter be adopted by any corporation of this state *may be amended or revised by the Board of directors* of the corporation by resolution of said board * * *.
>
> "Any amendment to or revision of the plan so made by the directors of the corporation may be *altered, changed or repealed by the stockholders*" (App. 3a-4a).

Section 14:9-5 of Article A with reference to stock option plans for employees provides that

> "The privileges and powers conferred by this Article shall be *in addition to and independent of*

all powers and authority conferred by any other law, and not in restriction or limitation of any of the powers of corporations of this State" (App. 1b).

STATEMENT OF THE CASE.

The Mengel Co. is a New Jersey corporation with its principal office in Louisville, Kentucky (App. 15b). It had outstanding 590,000 shares of stock, of which the Petitioner became the owner of 50 shares, or less than 1% of 1% of the outstanding common capital stock (16b, 17b).

In order to insure the continuation of Mr. Voit's splendid efforts as president of the Company (App. 32b-36b) in May 1944, the Board of Directors adopted a resolution, pursuant to the New Jersey Statutes, for granting an option to Mr. Voit, to purchase 10,000 shares of stock at $10.00 per share, which was the approximate market price. The resolution provided that the option could not be exercised unless Mr. Voit was still in the employ of the Company and until it had been approved by the stockholders (App. 33a). The resolution did not provide for any option to the directors.

The option was overwhelmingly authorized by the stockholders (App. 39a, 40a, 43a).

Thereafter, the Petitioner acquired 50 shares of the Company's common capital stock (App. 84a).

Effective May 28, 1948, the New Jersey Statute with reference to the granting of stock options was amended (L. 1948, c. 93, p. 530, §1) to provide that any plan

theretofore adopted or which might thereafter be adopted for the granting of a stock option by a New Jersey corporation, might be amended or revised by the board of directors, but that any such amendment or revision might be altered, changed or repealed by the stockholders (App. 3a, 4a, p. 2, *supra*).

On October 21, 1949, the Directors by resolution authorized the issuance of certificates for the 10,000 shares to Mr. Voit upon receiving his demand note in the amount of $100,000, bearing interest, and secured by a pledge of the certificates of stock endorsed in blank, the corporation to have no recourse against the president on the note except to the extent of the stock deposited as collateral (App. 25b). The market value of the stock on the date of the resolution was $9.25 per share (App. 25b). The option was promptly exercised (App. 13b).

The proxy statements for the annual stockholders meetings in April 1950, and May 1951, made a full and accurate disclosure of precisely what had been done as to the method of exercising the option, as stated and held by the Court of Appeals for the Sixth Circuit (219 F. 2d 704, 705); (App. 41a, 42a, 45a).

Although the stockholders' meetings were attended by 75% and 80% respectively of the stockholders, no action was proposed or taken at either of these meetings to alter, change or repeal the action of the Directors in amending the terms of the option. The directors in each year were reelected without opposition (App. 42a, 45a).

On December 12, 1950, the Petitioner brought her first suit in the New York State Court as a stockholder's derivative suit. After removal to the Federal Court, in order to avoid a motion to require her to give bond for costs, pursuant to §61-b of the New York General Corporation Law, she amended her complaint to make it sound as a stockholder's preemptive rights suit. See *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, wherein such litigations are "aptly characterized in professional slang as 'strike suits.'" The District Court overruled the motion to require bond, and on appeal to the United States Court of Appeals for the Second Circuit (*Ames* v. *Mengel Co.*, 190 F. 2d 344), the Court held there was no Federal jurisdiction because the suit was a spurious class suit, and the Petitioner's claim was far less than $3,000.

Thereafter, the Petitioner brought this suit in the District Court at Louisville.* She contends that it is a derivative cause of action, but still confuses it with a claim for preemptive rights (App. 28a, 29a). She does not show any damage suffered by the corporation since it has received the full $10.00 per share for the stock.

On January 9, 1953, during the pendency of the case in the District Court, and before judgment, the Petitioner *sold all of the stock which she owned at the time of the transaction complained of* (App. 84a, 85a, 39b, 40b). The only other stock claimed to be owned by her

*This suit was consolidated with another similar suit brought by Arthur and Hilda Haffer owning in the aggregate 75 shares of stock (App. 56a). Arthur and Hilda Haffer have not applied for a writ of certiorari, leaving the Petitioner the sole complaining stockholder in the entire company.

was acquired long after the transaction complained of and still stands in a street name (App. 84a, 85a, 86a, 87a, 39b, 40b).

The District Court dismissed the complaint (App. 87a) and the Court of Appeals affirmed (219 F. 2d 704).

Inaccuracies in the Petition.

1. The Petitioner (p. 2) states that the opinion of the United States Court of Appeals for the 2d Circuit "involved solely a procedural question," and then gives the wrong citation for the case. The opinion held that the gravamen of the complaint was alleged violations of Petitioner's preemptive rights and that an insufficient jurisdictional amount was involved. The correct citation is *Ames* v. *The Mengel Co.*, 190 F. 2d 344.

2. The Petitioner (pp. 5, 8) says the N. J. statute still requires any modification of a plan to be approved by two-thirds of the stockholders. This is confusing. The statute requires the directors to formulate a plan and to submit it to stockholders who may approve or modify it. But this completely overlooks the 1948 amendment (14:9-4; App. 3a, 4a) which empowers the board of directors to amend or revise a plan, theretofore or thereafter adopted, subject to the power of the stockholders to reject such revision or amendment.

3. The Petitioner (p. 6) says "There was no requirement that Mr. Voit had to remain in the employ of the company in order to exercise the option." On the contrary, the Directors' resolution provided that "No part of this option may be exercised unless Mr.

Voit is still in the employ of the company" (App. 33a) and the stockholders' resolution approving the plan, provided that "no part of this option may be exercised unless Mr. Voit is still in the employ of the Company" (App. 22b). That condition for the exercise of the option was never changed, nor violated. If Mr. Voit had left the company, which he had not, prior to paying off the demand note, all the company would have had to do to protect itself was to call the note.

4. The Petitioner (pp. 6, 7) states that "during the pendency of these actions, Mr. Voit acquired approximately 5,000 shares of the stock through the application of dividend payments on the note." Mr. Voit did not acquire any of the stock endorsed to and held by the Company until the note was fully paid. The Company, for its protection, not Mr. Voit's benefit, required all dividend payments on the collateral pledged to be applied on the note, which it had a right to do in order to have the full benefit of its collateral.

5. The Petitioner (p. 7) quotes in part from the proxy statement of April 4, 1950 (App. 45a). The quotation is inaccurate in the statement that Mr. Voit exercised the option on April 26, 1949. The proxy statement correctly stated that he exercised the option on October 26, 1949.

6. The Petitioner (p. 10) complains that "There was no decision upon the merits" by the court below. This is incorrect. The Court of Appeals held that the transaction was authorized by the New Jersey statutes (*Haffer* v. *Voit,* 219 F. 2d 704, 705).

ARGUMENT.

1. There is no conflict between the Court of Appeals' decision and the decisions of other Circuits and the Petitioner points to none. She merely assumes that there was a gift to Mr. Voit and claims that upholding a gift is contrary to the law generally. There was no gift and the Court of Appeals did not hold that there was or that corporate assets could be given away. The procedure followed in granting the option was precisely as authorized by the New Jersey Statutes, and the decision is in accord with the decisions of the New Jersey courts (*Eliasberg* v. *Standard Oil Co.*, 23 N. J. Super. 431, 92 A. 2d 862; aff. 12 N. J. 467, 97 A. 2d 437).

2. When the Petitioner sold, before judgment in the lower court, all of the shares of stock which she owned at the time of the transaction of which she complains, to-wit, at the time of the exercise of the option, she no longer had a right to maintain the suit. Rule 23(b) of the Federal Rules of Civil Procedure provides that in a suit of this nature it must be shown that the plaintiff "was a shareholder at the time of the transaction of which he complains * * *." She had no right to maintain the suit after she sold her stock.

3. The Petitioner did not make any effort to secure from the Directors or the shareholders the action she desired before bringing the suit. She alleged that the Directors were hostile (App. 18a) and that no demand was made upon the stockholders because of the large number of stockholders and because they resided in a

wide area. The Federal Rules of Civil Procedure, Rule 23(b), requires that

> "The complaint shall also set forth with particularity efforts of the plaintiff to secure from the managing directors or trustees, and, if necessary from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

The Directors had no personal interest. An honest effort to secure action from the stockholders was not futile and was requisite (*Long* v. *Stites*, 6th Circuit, 88 F. 2d 554; *Bruce & Co.* v. *Bothwell*, 8 F.R.D. 45).

4. It will not do to say that there was no consideration for the granting of the option. The Company received $10.00 per share for the stock, which was the market value at the time the option was granted and exercised. The Company could not lose. Either it would get payment or retain the stock pledged to it.

5. The Petitioner claims (Petition, pp. 13-16) that the 1948 amendment to the New Jersey option statute, which permitted the Directors to amend stock option plans subject to rejection by the stockholders, is unconstitutional because, she says, this takes away from stockholders certain voting rights which they would have had under the earlier statute. In this, the Petitioner is not arguing for the rights of the corporation, but for her rights as a stockholder. It has been finally adjudicated (*Ames* v. *Mengel Co.*, 190 F. 2d 344), that there is not sufficient amount involved to give Federal jurisdiction for the enforcement of her rights as a stockholder.

In addition, the Petitioner overlooks the fact that since 1846 New Jersey has had a statute reserving to the Legislature the power to make amendments (14:2-9), and which provides as follows:

> "The charter of every corporation or any supplement thereto or amendment thereof shall be subject to alteration, suspension and repeal, in the discretion of the Legislature, and the Legislature may at pleasure dissolve any corporation."

6. The argument (Petition, pp. 18-19) that under the New Jersey Statute (14:8-9), shares of stock can be sold only for cash or its equivalent is beside the point. That statutory provision was amended, insofar as applicable to stock options by the later provision of the stock option Statute (14:9-1; App. 1a), which authorizes the granting of options and the payment for such capital stock "in installments * * * and for aiding any such employees and other persons in paying for such stock by contributions, compensation for services, or otherwise"; and by the provisions of 14:9-5, which provides that the powers granted in the stock option statute are "in addition to and independent of all powers and authority conferred by any other law" (App. 1b).

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHAS. G. MIDDLETON,
LEO T. WOLFORD,
EDWIN G. MIDDLETON,
Counsel for Respondents.

MIDDLETON, SEELBACH, WOLFORD,
WILLIS & COCHRAN,
Of Counsel.

July 14, 1955.